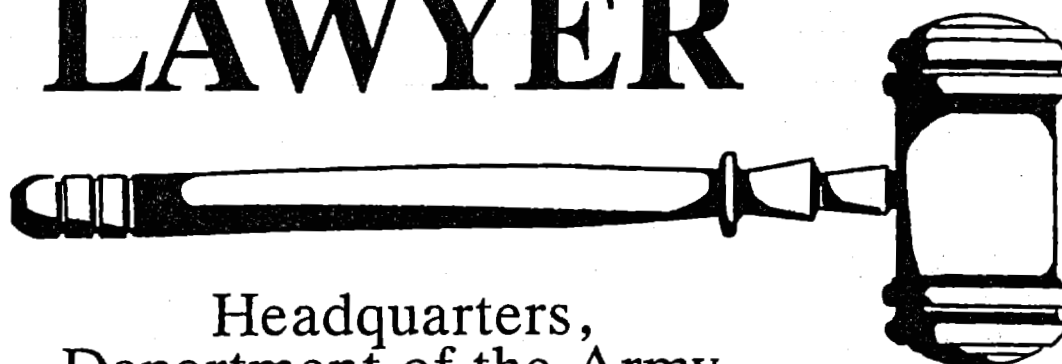


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Captain John B. Jones, Jr.

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A "Society Apart?" The Military's Response to the Threat of AIDS

Elizabeth Beard McLaughlin

Introduction

Although sometimes described as a "society apart,"¹ as a discrete and insular community limited by its own mission, its own structure, and its own specialized needs, the United States Armed Forces faces many of the same social issues within its ranks as does American society at large. One of the most challenging social issues of our time is the spread of AIDS. The military community met this difficult issue early on, and head-on.

This article will discuss the threat of AIDS generally, and the various proposals made by government and health care officials for halting its spread. Measures taken by the military community to limit the spread of AIDS both within the ranks and without will be examined in detail. The focus of this article will be the aggressive and creative use of the military justice system as a tool of deterrence and punishment for those who spread the disease. The article will conclude with a summary of cases to come, an evaluation of the military's policy toward AIDS, and a discussion of what state and federal civil governments can learn and perhaps adopt for themselves from this "society apart."

The AIDS Epidemic

AIDS: The Scientific Data

AIDS is the acronym for Acquired Immunodeficiency Syndrome. A person with AIDS has the human immunodeficiency virus (HIV), which damages the body's immune system and opens the body to diseases that take advantage of the immune system's weakened condition. The presence of an HIV antibody indicates that a person is infected with the precursor to AIDS; it does not mean that the person has AIDS, will necessarily develop AIDS, or will die from AIDS.

AIDS is most easily explained as a progression through five stages of HIV infection: (1) seronegative HIV; (2) seroposi-

tive HIV; (3) AIDS-related complex; (4) AIDS; and (5) death caused by an opportunistic disease.²

Stage One begins with initial HIV infection. At this stage, HIV antibodies have not yet developed in the blood, therefore, infection cannot yet be detected. The first stage can last anywhere from three weeks to six months before seroconversion occurs and Stage Two begins.³

After seroconversion takes place, HIV can be detected by a blood test. The most important aspect of Stage Two is the ability to infect others. Stage Two carriers remain HIV positive for life, even if they never develop clinical symptoms.⁴

Stage Three begins when two or more of the following clinical symptoms of HIV infection develop: fevers, diarrhea, swollen lymph nodes, severe weight loss, night sweats, exhaustion, and neurological disorders such as AIDS dementia.⁵

The fourth stage is AIDS. The Centers for Disease Control's definition of AIDS requires the existence of opportunistic cancers and infections.⁶ At this stage the immune system has deteriorated to the point where the patient is susceptible to diseases that rarely occur in healthy people. Once a patient has advanced to AIDS, his or her condition is conclusively presumed to be fatal.

The last stage, death, usually occurs within two years after AIDS has developed. The damage to the immune system ultimately becomes so extensive that the patient dies from the opportunistic disease rather than from AIDS itself.⁷

The spread of AIDS often has been referred to as a scourge of epidemic proportions. But AIDS cannot be likened to other well-known epidemic diseases such as tuberculosis because HIV has no airborne infection capability and AIDS cannot be

¹ *Parker v. Levy*, 417 U.S. 733, 744 (1974) (citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

² See generally DEPARTMENT OF HEALTH AND HUMAN SERVICES, AIDS—A PUBLIC HEALTH CHALLENGE: STATE ISSUES, POLICIES AND PROGRAMS (1987) [hereinafter AIDS—A PUBLIC HEALTH CHALLENGE].

³ *Id.* at 22.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ *Id.* at 1.

⁷ *Id.* at 2.

spread by casual contact.⁸ Although traces of HIV have been found in saliva, breast milk and tears, it is most concentrated in blood and semen.⁹ The threat of AIDS lies in the fact that HIV is incurable; once a person is infected, he or she becomes an AIDS carrier for life and can infect others over his or her lifetime.

The virus can be transmitted only three ways: (1) sexual intercourse (vaginal or anal); (2) parenteral blood (sharing intravenous needles, blood transfusions, and organ transplants); and (3) from an infected mother to her fetus.¹⁰ The virus can be, but is not necessarily, transmitted in one exposure.¹¹

Unprotected sexual intercourse is well documented as the predominant way of spreading AIDS.¹² Although the risk to homosexuals thus far has been greatest, more and more cases of heterosexual transmission are being reported. The virus can be transmitted from male-to-female, and from female-to-male.¹³

Combatting the Spread of AIDS

Proposed methods of halting the spread of AIDS have received much attention in recent years. Ad campaigns, educational programs in schools, condom distribution, and needle distribution to drug users are some of the methods now in place at state and local levels. Other suggestions include quarantine of those who are infected, the application of tort law theories (using negligence or battery theories to impose liability on HIV carriers who fail to disclose their status to sex partners or to take appropriate precautions to safeguard part-

ners against transmission of the virus), and application of state sexually transmitted disease statutes.¹⁴

Another recommended method is applying traditional criminal laws—such as aggravated assault—to punish behavior that risks HIV infection.¹⁵ The President's Commission on the HIV Epidemic recommended in its June 1988 report that states adopt criminal statutes directed specifically to HIV-infected persons who know of their status and engage in behavior that they know is likely to result in transmission of the virus.¹⁶ The Commission further recommended that the statutes should impose on sexually active HIV-infected persons who know of their status "specific affirmative duties to disclose their condition to sexual partners, . . . and to use precautions . . ."¹⁷

In 1987 alone, twenty-nine bills containing criminal sanctions specifically addressed to AIDS were introduced in state legislatures.¹⁸ More than twenty-five states currently have laws making it either a misdemeanor or a felony for an HIV-positive person to spread the virus through methods ranging from sexual contact to the splattering of blood.¹⁹

A recent case of HIV-related sexual conduct illustrates the importance of these criminal statutes. Edward "Uncle Ed" Savitz, a Philadelphia businessman, was arrested in March 1992 after being accused of having sexual relations with hundreds of young men without informing them that he was infected with HIV.²⁰ He was charged with involuntary deviate sexual intercourse, sexual abuse of children, indecent assault, and corrupting the morals of a minor.²¹ Because Pennsylvania does not have criminal statutes specifically addressed to AIDS, prosecutors have to address the issue indirectly.

⁸*Id.* at 3.

⁹*Id.*

¹⁰*Id.* 2, 3.

¹¹*Id.* at 3.

¹²United States AIDS Program, Center for Infectious Diseases, Centers for Disease Control, *AIDS Weekly Surveillance Report*, Nov. 7, 1988.

¹³AIDS—A PUBLIC HEALTH CHALLENGE, *supra* note 2, I at 3.

¹⁴See generally AIDS: The Legal Issues, Discussion Draft of the American Bar Association AIDS Coordinating Committee (1988), at 21-27 [hereinafter AIDS: The Legal Issues].

¹⁵*Id.* at 23-24.

¹⁶Report of the President's Commission on the Human Immunodeficiency Virus Epidemic, 24 June 1988, at 9-46.

¹⁷*Id.*

¹⁸AIDS: The Legal Issues, *supra* note 14, at 29.

¹⁹Possession of a Dangerous Weapon, *TIME*, Dec. 14, 1992, at 23.

²⁰This case was widely publicized in March and April 1992. See, e.g., *AIDS Victim who had Sexual Contact with Teens Rearrested*, *THE CHICAGO TRIBUNE*, Mar. 29, 1992, at 6, zone C.

²¹*Id.*

AIDS and the Military Community

Statistics

The AIDS epidemic has had a significant impact on the military community. From October 1985 through August 1989, more than 6200 service members were diagnosed as positive for HIV. As of August 1989, nearly 300 service members have died of AIDS.²²

Combatting the Spread of AIDS

The United States Court of Military Appeals (COMA), the military's highest appellate court, specifically has stated that the military has a "public duty of the highest order" to prevent service members from spreading HIV.²³ In an effort to perform this duty, leaders of all branches of the military have taken affirmative steps to control AIDS within the ranks and prevent the spread of the disease from the military to the civilian community. These measures include performing blood tests on applicants before they enter the service, educating service members about AIDS transmission and prevention, and retesting both active and reserve duty service members on a regular basis.²⁴

Testing

Military blood donor screening has been in effect since July 1, 1985.²⁵ All branches of the service screen applicants before they enter the service, and reject those who test positive for the HIV antibody.²⁶ All active duty, reserve, and national guard service members routinely are tested at least biennially for HIV,²⁷ and other health care beneficiaries—such as spouses

and children—routinely are screened in conjunction with some health care procedures such as yearly physical examinations.²⁸

Service members who test HIV-positive are not automatically discharged or separated; they are evaluated for retention and retained if they meet existing medical standards. If retained, the infected service member is given medical care and extensive medical counseling, assigned to duties consistent with his or her medical condition, and receives a medical separation only when he or she is no longer healthy enough to serve.²⁹ Those who are separated remain eligible for continuing medical treatment through the Department of Veteran's Affairs.³⁰

Education

One of the most important goals of the military's AIDS policy is to prevent the spread of AIDS. Consequently, all service members are taught about AIDS and how it is transmitted. Service members who test HIV-positive receive extensive medical counseling, during which the significance of the service member's status as an HIV carrier is explained in detail. Among the topics discussed are the methods of transmitting the virus, precautions that minimize the risk of transmission, and the need for the infected service member to advise any past sexual partners of his or her HIV infection.³¹

Counseling and the "Safe-Sex" Order

What has been called the "cornerstone"³² of the military's AIDS policy is the requirement that commanders in all branches of the service deliver formal counseling to service members who test positive for the HIV antibody.³³ This

²² Eugene Milhizer, *Safe Sex . . . or Else*, 5 ABA CRIM. JUST., Winter 1991, at 17.

²³ United States v. Dumford, 30 M.J. 137, 138 n.2 (C.M.A. 1990).

²⁴ Memorandum, subject: Secretary of Defense Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (20 Apr. 1987) [hereinafter HIV Policy Memorandum]. For a detailed discussion of the development of the Department of Defense's policy concerning AIDS, and implementation of the policy in the Air Force, see Anderson, Kramer, & Shambley, *AIDS Issues in the Military*, 32 A.F.L. REV. 353 (1990).

²⁵ DEP'T OF ARMY, REG. 600-110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV), para. 2-2a (11 Mar. 1988) (IC, 2824Z Mar. 1989) (101, 22 May 1989) [hereinafter AR 600-110].

²⁶ HIV Policy Memorandum, *supra* note 24.

²⁷ See AR 600-110, *supra* note 25, para. 2-2h.

²⁸ See, *id.* para. 2-2j.

²⁹ See generally, *id.*

³⁰ Milhizer, *supra* note 22, at 17.

³¹ *Id.*

³² Eugene Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, ARMY LAW., Dec. 1988, at 4.

³³ See, e.g., the Army's regulation, AR 600-110, *supra* note 25, para. 2-17. The other services require similar "safe-sex" orders; see Memorandum, subject: Policy for Administering the Order to Follow Preventive Medicine Requirements to Individuals Infected with the Human Immunodeficiency Virus (HIV) and to the Use of Laboratory Test Results, to the Air Force Surgeon General, (8 July 1988), (amending, SAF/RS Memorandum, subject: Policy on the Identification, Surveillance, and Administration of Personnel Infected with the Human Immunodeficiency Virus (HIV), (23 Sept. 1987)); see also SECNAV Instruction 5300.30A, subject: Management of Human Immunodeficiency Virus (HIV) Infection in the Navy and Marine Corps, para. 13b(1)(a) (27 Oct. 1987).

counseling is provided in addition to, and as a complement, to the preventive medicine counseling given by health care personnel. The counseling comes in the form of a prescribed written counseling statement³⁴ which, in most cases, also is orally communicated to the soldier.

The most important—and controversial—aspect of the counseling is a three-part direct order to the infected service member. An HIV-positive service member is ordered to: (1) inform any prospective sexual partners of his or her condition prior to beginning sexual relations; and use barrier protection during sex; (2) not donate blood, sperm, or other bodily fluids or tissues; and (3) inform medical personnel of his or her HIV status before seeking or receiving medical treatment.³⁵

Enforcing the AIDS Policy

Those service members who put others at risk of HIV infection are subject to grave penalties under the Uniform Code of Military Justice (UCMJ), the United States statutes that codify the military's criminal justice system.³⁶ Those who disobey the safe-sex order risk administrative or disciplinary actions, including court-martial.

The serious threat of AIDS has resulted in new developments in military justice. Traditional methods of prosecution using the court-martial system have been expanded to include the transmission of HIV through sexual relations as a new offense. Theories on which reported military cases involving HIV have been prosecuted can be grouped into two categories. The first category includes two uniquely military offenses: willful disobedience of a lawful order of a superior,³⁷ and con-

duct prejudicial to the good order and discipline of the Armed Forces.³⁸ The second category includes crimes having civilian counterparts: assault and aggravated assault.³⁹ The COMA has upheld all four of these theories of prosecution, but not without a struggle.

The Cases

General Remarks

The military's AIDS policy has not gone unquestioned. As in most cases when the government seeks to regulate or prohibit what widely is considered to be private behavior, the legitimacy of AIDS-related courts-martial has been litigated in court. Each of the three Courts of Military Review,⁴⁰ as well as the COMA,⁴¹ has addressed this issue.

Cases questioning the legitimacy of the safe-sex order are the most interesting of the body of cases, due to their complexity. Attacks on the order have involved a blend of government concerns and constitutional inquiry; the analysis required a balancing act between the government's right to control the spread of disease, and an individual's right to privacy and freedom in sexual intimacy. The equation has been complicated by the need to balance both of those interests in the context of the legitimate needs of the military in order to fulfill its mission.⁴²

Prosecutions under Article 134 for AIDS-related conduct alleged to be prejudicial to the good order and discipline of the Armed Forces also have been questioned in court. These

³⁴ See, e.g., AR 600-110, *supra* note 25, para. 2-17b.

³⁵ *Id.* para. 2-17c, which reads as follows:

Counseling will include a direct order to verbally inform their sexual partners of their infection prior to engaging in intimate sexual behavior. Sexual relations with a spouse is a decision that can only be made by the spouse after full counseling regarding the risks involved. Counseling will also include a direct order not to engage in unprotected sexual relations with persons other than their spouse, or donate blood, sperm, tissues, or other organs. Soldiers who willfully disobey this order may be considered for administrative or disciplinary action, as appropriate.

³⁶ The Uniform Code of Military Justice (UCMJ) comprises sections 801 to 946 of title 10, United States Code. The UCMJ was enacted by Congress May 5, 1950 and became fully effective May 31, 1951 (Pub. L. 506 (81st Cong., 2d Sess.)). The Code provides a statutory framework for military justice and its administration in all branches of the armed forces. Among other things, the Code establishes a system of military courts, defines offenses, authorizes punishment, and provides procedural guidance. Article 36 of the UCMJ authorizes the President to promulgate rules of procedure before courts-martial. These rules, for the most part, are found in the MANUAL FOR COURTS-MARTIAL, United States, (1984) (prescribed by Executive Order No. 12473 (Apr. 13, 1984)) [hereinafter MCM].

³⁷ UCMJ art. 90 (1988).

³⁸ *Id.* art. 134 (1988), the "general article." None of the reported AIDS-related cases to date have involved prosecution of officers. Officers who engage in conduct related to the spread of AIDS theoretically could be punished under article 133—the other "catch-all" article—for conduct unbecoming an officer and a gentleman.

³⁹ *Id.* art. 128 (1988).

⁴⁰ The three courts of military review are: the Army Court of Military Review, the Air Force Court of Military Review, and the Navy-Marine Corps Court of Military Review. The courts were established pursuant to article 65, UCMJ, and their scope of review is governed by that article.

⁴¹ The COMA is a federal civilian court composed of five civilian judges. Appeals to this court are governed by article 67, UCMJ.

⁴² See Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, ARMY LAW., Jan. 1988, at 18.

cases focus on the very article itself—one of the most controversial and least understood of the military's punitive articles. Questions include those relating to the article's purpose, its scope, and whether the accused had notice that his conduct would violate the terms of the article. Deeply intertwined—although not explicit—in these cases, is the question of legitimacy of the recognition given to the military as a "society apart," having unique judicial needs requiring deference on questions involving the service members' constitutional rights.

The government's theories of prosecution for assault and aggravated assault have not escaped criticism. Resolution of these cases has hinged on the wording of the statute and on precise definitions, as well as on the issue of consent as a defense to assault. The courts in these cases engaged in analysis more familiar to the civilian practitioner; these cases focus more on common law than military law.

Willful Disobedience: The Safe-Sex Order Cases

The typical fact pattern of safe-sex order cases is simple: a service member—in all cases to date the accused has been male—after testing positive for HIV and receiving both preventive medical counseling and the safe-sex order, engages in unprotected sexual acts with a partner who is unaware of his medical condition. The partner finds out about the soldier's status—sometimes by testing positive for HIV—and a court-martial follows.

The authority to enforce orders given by commissioned officers stems from Article 90 of the UCMJ. Article 90 reads in pertinent part, "Any person subject to this chapter who . . . willfully disobeys a lawful command of his [or her] superior commissioned officer . . . shall be punished . . ." ⁴³ Much of the controversy surrounding the safe-sex orders has centered on the unique requirements of a "lawful command." Challenges to prosecutions under this article have questioned the constitutional authority for an order that regulates a service member's ability to conduct a sexual relationship. Cases involving Article 90 are the most interesting of the military cases that address HIV, because they address issues of traditional constitutional law in addition to legal issues specifically associated with the needs of the military.

The first court-martial for violations of the safe sex order occurred in 1987. *United States v. Womack*, ⁴⁴ decided in 1989, was the first safe-sex case to reach the COMA. Womack was diagnosed as HIV-positive, after which he received medical counseling and then was given a six-part written order by his commander. The portions of the order that Womack was charged with violating required him to: (1) inform all present and future sexual partners of his HIV infection; (2) avoid transmitting the infection by taking affirmative steps to protect his sexual partners from coming into contact with his blood, semen, urine, feces, or saliva; and (3) refrain from any acts of sodomy or homosexuality as proscribed by the UCMJ regardless of whether his partner consented. ⁴⁵

Approximately seven weeks after receiving the order, Womack performed fellatio upon a fellow serviceman. Womack did not inform the serviceman of his infection, did not ensure that barrier protection was used, and did not obtain the victim's consent. ⁴⁶ Womack was charged with violating Article 90 and with committing forcible sodomy.

At his arraignment, Womack moved to dismiss the Article 90 charge. He claimed that the safe-sex order was constitutionally defective, overly intrusive, and overbroad in its application. Womack also charged that the order attempted to regulate constitutionally protected private conduct. ⁴⁷ The military judge denied Womack's motion and entered specific findings of fact affirming the validity and enforceability of the order under Article 90. Thereafter, Womack entered a conditional plea of guilty to the willful disobedience charge—preserving for appellate review the question of the lawfulness of the order—⁴⁸ and a guilty plea to forcible sodomy. ⁴⁹

On appeal to the Air Force Court of Military Review (AFCMR), Womack claimed that the order was an unlawful exercise of command authority because it was overbroad, overly intrusive, and exceeded any military necessity. ⁵⁰ The AFCMR found that the order indeed was lawful, and affirmed Womack's conviction.

The AFCMR stated that for a military order to be lawful, it must relate to a valid military purpose, and an order may interfere with personal rights or private affairs only if such a valid military purpose exists. ⁵¹ The AFCMR found that safe-

⁴³ UCMJ art. 90 (1988).

⁴⁴ 27 M.J. 630 (A.F.C.M.R. 1988), *aff'd* 29 M.J. 88 (C.M.A. 1989).

⁴⁵ *Womack*, 29 M.J. at 89-90.

⁴⁶ *Id.*

⁴⁷ *Id.* at 89.

⁴⁸ MCM, *supra* note 36, R.C.M. 910(a)(2).

⁴⁹ *Womack*, 27 M.J. at 631.

⁵⁰ *Id.* at 632.

⁵¹ *Id.*

guarding the overall health of members of the unit to ensure both unit readiness and the ability of the unit to accomplish its mission was a valid military purpose that justified the order.⁵²

The AFCMR then addressed Womack's assertion that the component parts of the order were broader in scope than that of protecting the health and welfare of the unit. The AFCMR found that although the order on its face was not restricted to Womack's sexual relations with other service members, the act in question did involve another service member, and thus was fully within the valid concern of the commander who issued the order.

The AFCMR analyzed each part of the order that Womack was accused of violating. First, the AFCMR found that the requirement that Womack notify sexual partners of his infection did not prohibit, and therefore, did not unduly infringe, on Womack's ability to engage in sexual relations.⁵³ Second, the requirement that Womack protect sexual partners from coming into contact with his saliva was a lawful exercise of command authority. Womack argued that this part of the order interfered with his ability even to kiss someone on the mouth. The AFCMR reasoned that kissing was not the issue before the court—fellatio was. Based on expert testimony adduced at trial that indicated HIV could be transmitted through saliva, the AFCMR found that the commander was justified in including saliva in the terms of the order.⁵⁴ Third, the AFCMR noted that the UCMJ prohibited acts of sodomy and homosexuality. Therefore, the order did no more than direct that Womack abstain from engaging in an already prohibited activity.⁵⁵

The COMA denied Womack's assertion that the military judge had erred in failing to dismiss the charge relating to the safe-sex order. The COMA stated that, to be lawful, an order must be a clear and specific mandate to do a particular act. Additionally, the order "must be worded so as to make it specific, definite, and certain, and it may not be overly broad in scope or impose an unjust limitation on personal rights."⁵⁶ The COMA found that "[a] plain reading of this order demonstrates that it was specific, definite, and certain."⁵⁷ Further, "it is obvious that appellant had actual knowledge of its nature and terms, and he was on fair notice as to the particular conduct which was prohibited."⁵⁸ Accordingly, the order—as applied to Womack's conduct—was anything but vague.⁵⁹

In response to Womack's contention that the order did not relate to any valid military purpose, the COMA noted—as it had decided only recently in *United States v. Woods*⁶⁰—that both the military and society at large have compelling interests in having service members remain healthy and capable of performing their duties.⁶¹ Therefore, the safe-sex order—which helps to achieve that goal—serves a valid military purpose.⁶²

Finally, the COMA addressed Womack's argument that the order interfered with his constitutionally protected private sexual activities. Citing *Bowers v. Hardwick*,⁶³ the COMA noted that forcible sodomy is not constitutionally protected conduct.⁶⁴ Additionally, privacy rights and expectations "apply differently to the military community because of the unique mission and need for internal discipline."⁶⁵ For example, the armed forces can require service members to be inoculated against diseases, even if doing so violates the service member's religious beliefs,⁶⁶ and can regulate relationships

⁵² *Id.* at 633.

⁵³ *Id.*

⁵⁴ *Id.* at 633-34.

⁵⁵ *Id.* at 634-35.

⁵⁶ *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989) (citing *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972); *United States v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958)).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 28 M.J. 318 (C.M.A. 1989).

⁶¹ *Womack*, 29 M.J. at 90; see MCM, *supra* note 36, pt. IV, para. 14c(2)(a)(iii).

⁶² *Womack*, 29 M.J. at 90-91.

⁶³ 478 U.S. 186 (1986).

⁶⁴ *Womack*, 29 M.J. at 91.

⁶⁵ *Id.* (citing *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 31 (1982)).

⁶⁶ *Id.* (citing *United States v. Chadwell*, 36 C.M.R. 741 (N.B.R. 1965); *United States v. Jordan*, 30 C.M.R. 424 (A.B.R.), *pet. denied*, 30 C.M.R. 417 (C.M.A. 1960)).

between officers and enlisted personnel.⁶⁷ Therefore, the armed forces can legally prohibit or regulate conduct that is permitted elsewhere.⁶⁸

Whether the safe-sex order was constitutional when applied to sexual relations with civilians remained unsettled after *Womack*. Although the safe-sex order issued to Womack was broad enough to include sexual relationships with civilians, the COMA and the AFMCR dodged the question whether this made the order overbroad.⁶⁹

Whether the safe-sex order was constitutional when applied to sexual relations outside of prohibited sodomy also remained unsettled after *Womack*. Less than two months later, the Army Court of Military Review (ACMR) addressed that question, and the question of sexual relations with civilians, in *United States v. Sargeant*.⁷⁰ In May 1990, the COMA likewise addressed this issue in *United States v. Dumford*.⁷¹

Sargeant tested positive for HIV and received the standard medical counseling on his condition. Sargeant, however, continued to have unwarned and unprotected sex. He subsequently was given a written safe-sex order by his commander which he ignored, continuing to have unwarned and unprotected sex with two female soldiers on several occasions.⁷²

On appeal—after his conviction at court-martial for violating the safe-sex order—Sargeant asserted the same defenses used by Womack: that the order did not have a valid military purpose and that the order violated his constitutional right to privacy without any overriding demands of discipline present to justify the intrusion.⁷³

The ACMR heavily relied on *Womack* in finding that the safe-sex order had a valid military purpose and lawfully intruded on Sargeant's right to privacy. The ACMR found

that the commander's concerns over the health and welfare of his soldiers and the impact that Sargeant's sexual conduct could have on the morale and efficiency of the unit sufficiently endowed an order related to those concerns with a valid military purpose.⁷⁴

Sargeant claimed that the order violated his constitutional right of privacy—that is, his right to engage in consensual, private, intimate *heterosexual* relations with another. The ACMR acknowledged that a lawful order may not interfere with private rights or personal affairs without a valid military purpose,⁷⁵ and that an order must not conflict with the statutory or constitutional rights of the person receiving the order. The ACMR, however, found that protecting the health and welfare of other soldiers is a goal that clearly reflects a compelling government interest, and that "[w]hatever privacy interest this unmarried soldier had when he engaged in unwarned and unprotected sex with two female soldiers is outweighed by the Army's compelling interest to protect the health and welfare of its personnel and the public especially in light of the scope and danger of the risk involved."⁷⁶

The ACMR found that the order given was broad enough to cover sexual activities with nonmilitary persons. The ACMR stated, "[w]e are convinced that the military has a proper interest in taking reasonable steps to ensure that its soldiers who have the AIDS virus do not infect their sexual partners, regardless of their status."⁷⁷

Senior Airman Dumford also received a safe-sex order after he was identified as HIV-positive. That same day, while on a pass from the hospital, Dumford met a civilian woman with whom he later had sexual intercourse. Dumford did not tell her he was HIV-positive, nor did he use protective measures during their sexual relations. Dumford pleaded guilty to disobeying the safe-sex order under Article 90 and to charges of aggravated assault under Article 128.⁷⁸

⁶⁷ *Id.* (citing *United States v. Johanns*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985)).

⁶⁸ *Id.*

⁶⁹ *Id.*; *United States v. Womack*, 27 M.J. 630, 633 (A.C.M.R. 1988).

⁷⁰ 29 M.J. 812 (A.C.M.R. 1989).

⁷¹ 28 M.J. 836 (A.F.C.M.R. 1989), *aff'd* 30 M.J. 137 (C.M.A. 1990).

⁷² *Sargeant*, 29 M.J. at 813-14.

⁷³ *Id.* at 814.

⁷⁴ *Id.* at 815 (citing *United States v. Chadwell*, 36 C.M.R. 741 (N.B.R. 1965) (order to receive inoculations upheld against claim that order was violative of personal religious convictions)).

⁷⁵ See, MCM, *supra* note 36, pt. IV, para. 14c(2)(a)(iii).

⁷⁶ *Sargeant*, 29 M.J. at 816-17.

⁷⁷ *Id.* at 814 (quoting *United States v. Womack*, 27 M.J. 630, 633 (A.F.C.M.R. 1988), *aff'd* 29 M.J. 88 (C.M.A. 1989)).

⁷⁸ *United States v. Dumford*, 28 M.J. 836, 838 (A.F.M.C.R. 1989).

Dumford argued on appeal that the safe-sex order was illegal because it was overly broad—it restricted his right to engage in consensual heterosexual intercourse—and because the order as it related to his interactions with civilians did not serve a valid military purpose. While Dumford acknowledged that the military's interest in protecting the health and welfare of the military community is unquestioned, he argued that "protecting every civilian in the world from a military AIDS carrier stretches a valid military interest beyond the point of adequately protecting the rights of the individuals."⁷⁹

Both the AFCMR and the COMA rejected Dumford's contentions. The COMA noted that the order did not impermissibly intrude on Dumford's right to engage in consensual heterosexual intercourse because the order did not prohibit sexual contact; it merely set forth the terms under which appellant could engage in sexual activities.⁸⁰

Noting that the safe-sex order given Dumford was similar to that upheld in *Womack*, the COMA found that the only question concerning its legality was the scope of the order: because the order required appellant to warn civilians as well as service members, did the scope exceed a valid military necessity? The COMA found that when a service member is capable of exposing others to infectious disease, the military has a legitimate interest in limiting his contact with others—including civilians—and preventing the spread of the disease.⁸¹

Are the two parts of the safe-sex order separately enforceable? The ACMR found that they were in *United States v. Negron*.⁸² Although Negron had complied with the portion of the order requiring him to wear a condom during sexual relations, he had not informed his sexual partner that he was HIV-positive. Negron was tried and convicted of disobeying just the one part of the order.

The ACMR affirmed Negron's conviction. By so doing, the ACMR indicated that the portion of the safe-sex order requiring an HIV-positive service member to warn prospective sex partners is separately enforceable from the rest of the order. The ACMR found that absent such a warning, consent by the partner to intercourse is uninformed and therefore, not effective.⁸³ The ACMR concluded that the safe-sex order was "a minimally restrictive and eminently reasonable measure in furtherance of a compelling public health interest."⁸⁴ The COMA summarily affirmed.⁸⁵

To date, no service member has been prosecuted under Article 90 for the counterpart to the issue in *Negron*—that is, no barrier protection was used although the sexual partner consented to relations with a service member known to be infected with HIV. The courts, however, have decided such cases under Articles 128 and 134. The results of these cases demonstrates that military courts will not look favorably on consent as a defense to life-threatening conduct by a service member.

One significant issue remains unresolved: can the safe-sex order be extended to the marital relationship? The Army's current regulation concerning the safe-sex order excludes its application to the marital relationship.⁸⁶ The current Air Force regulation, however, makes marital sexual relations without a condom unlawful because the order includes sexual relations with military dependents or any other persons.⁸⁷ At least one author has argued that because of the strength of the United States Supreme Court's convictions in the privacy of marriage as expressed in cases like *Griswold v. Connecticut*,⁸⁸ the military is not likely to prosecute successfully an HIV-positive service member for engaging in consensual—but unprotected—sexual intercourse with his or her spouse.⁸⁹

⁷⁹ *Id.*

⁸⁰ *United States v. Dumford*, 30 M.J. 137, 138 (C.M.A. 1990).

⁸¹ *Id.*

⁸² 28 M.J. 775 (A.C.M.R. 1989).

⁸³ *Id.* at 778 n.6.

⁸⁴ *Id.* at 778-79.

⁸⁵ *United States v. Negron*, 29 M.J. 324 (C.M.A. 1989).

⁸⁶ AR 600-110, *supra* note 25, para. 2-17c.

⁸⁷ For the text of the Air Force regulation, see Anderson, Kramer, & Shambley, *supra* note 24, at 363 n.75.

⁸⁸ 381 U.S. 479 (1965).

⁸⁹ SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 97 (3d ed. 1992).

Prosecutions Under the "General Article"

One of the most controversial "crimes" in military practice is Article 134, the so-called "general article."⁹⁰ This article makes punishable three categories of offenses: conduct to the prejudice of good order and discipline in the armed forces; conduct of a nature to bring discredit upon the armed forces; and conduct violating federal or state law.⁹¹ Article 134 makes punishable *all* acts that are not proscribed specifically in other punitive articles of the UCMJ. Commonly recognized offenses that fall under this article include adultery, assault, cohabitation, fraternization, indecent acts, and prostitution.⁹² Article 134, although unspecific and unlike any other United States criminal statute in form, has been deemed constitutional by the United States Supreme Court. In *Parker v. Levy*⁹³ the Court ruled that in the context of a separate military society and corresponding military system of justice, the article was neither unconstitutionally vague nor overbroad.⁹⁴

The first of the six AIDS-related cases that the COMA decided was *United States v. Woods*.⁹⁵ Woods was charged with violating Article 134 because: (1) he had engaged in unprotected sexual intercourse with another service member when he knew that his seminal fluid contained a deadly virus capable of being transmitted sexually; and (2) he had been counseled regarding infecting others, and knew that to engage in sexual intercourse without protection was an inherently dangerous act likely leading to death or great bodily harm.⁹⁶

The narrow issue addressed by the trial court, and subsequently by the Navy-Marine Corps Court of Military Review

(NMCMR) and the COMA, was whether the charge as written stated an actual offense under military law. At arraignment, Woods moved to dismiss the charge for failure to state an offense. The military judge granted his motion after finding that the specification was deficient: the charge failed to allege sufficient words of criminality and failed to allege that the accused did not inform the person with whom he had sexual contact with that he was infected with HIV.⁹⁷

On government appeal of the dismissal,⁹⁸ the NMCMR vacated the ruling and returned the record to the trial judge. The NMCMR ruled that although "the better practice would have been to employ more traditional words of criminality to this allegation,"⁹⁹ the absence of such words was not dispositive. The allegation that Woods, knowing he was HIV-positive and knowing that HIV was transmittable, engaged in an act that he knew was inherently dangerous to another, "on its face describes conduct that we conclude has both direct and adverse impact upon relations between military personnel, and which substantially derogates from the health, welfare, and discipline of the military command."¹⁰⁰ The NMCMR called Wood's actions "reckless conduct."¹⁰¹

On appeal, the COMA first described a two-part test for whether an act falls within Article 134's scope: was the act palpably prejudicial to the good order and discipline of the service¹⁰² and was the accused on fair notice from the language of the article that the particular conduct in which he engaged was punishable.¹⁰³ The COMA then found that if the allegations against Woods were established, a factfinder properly could find that the conduct was "palpably and directly

⁹⁰ UCMJ art. 134 (1988), reads as follows:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

⁹¹ SCHLUETER, *supra* note 89, at 76.

⁹² *Id.* at 96. These commonly recognized offenses can be found in MCM, *supra* note 36, pt. IV, paras. 61-113; which contain each offense and the elements necessary to establish guilt under the article.

⁹³ 417 U.S. 733 (1974).

⁹⁴ For an excellent discussion of the military as a "society apart" both before and after *Levy*, see Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

⁹⁵ 27 M.J. 749 (N.M.C.M.R. 1988), *aff'd* 28 M.J. 318 (C.M.A. 1989).

⁹⁶ *Woods*, 27 M.J. at 750.

⁹⁷ *Id.*

⁹⁸ UCMJ art. 62 (1988).

⁹⁹ *Woods*, 27 M.J. at 751.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 753.

¹⁰² *United States v. Woods*, 28 M.J. 318, 319 (C.M.A. 1989) (quoting *United States v. Sadinsky*, 34 C.M.R. 343, 346 (C.M.A. 1964)).

¹⁰³ *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 755 (1974)).

prejudicial" to good order and discipline of the service,¹⁰⁴ and therefore, that the allegations were sufficient to state an offense. Accordingly, the COMA gave specific approval of yet another use for Article 134: as a tool for prosecution of HIV-positive service members who engage in unsafe sex.

Because the procedural posture of the case did not require it, the COMA did not discuss fully the two-part test it had outlined. Although the COMA failed to articulate exactly why the conduct was palpably prejudicial—perhaps because the conduct was "reckless"—it did examine the question of notice.

The question of notice is particularly important in the case of Article 134 offenses prosecuted under new theories such as HIV-related activity, because the elements of the crime that must be proved are not laid out in the statute or in the *Manual for Courts-Martial*.¹⁰⁵ Just as the Supreme Court noted in *Parker v. Levy*, the COMA observed that all service members receive detailed instructions pertaining to Article 134 on entering the military and again after six months of service.¹⁰⁶ The COMA apparently felt that this instruction gave all service members sufficient notice that conduct prejudicial to good order and discipline is punishable.¹⁰⁷

The ACMR relied on *Woods* in hearing another Article 134 case, *United States v. Morris*,¹⁰⁸ decided in July 1990. Morris was convicted under Article 134 of wanton disregard for human life because of his unprotected sexual relations with a female service member after he had tested HIV-positive. On appeal, Morris conceded that the gravamen of his offense consisted of his placing his sexual partner at risk for contracting AIDS. Morris, however, claimed that prosecution for his conduct constituted a violation of his due process rights because he did not know, nor could have reasonably known, that his conduct—nondeviant sexual intercourse with an unmarried female—was unlawful. Morris asserted that no one in authority told him that such activity would constitute a violation of the UCMJ.¹⁰⁹

The ACMR disposed of Morris' appeal on this issue in one paragraph. The ACMR made three specific findings. First, a factfinder properly could find that Morris' willful and deliber-

ate exposure of another service member to the risk of contracting the HIV virus was action prejudicial to good order and discipline. Second, Morris should have been aware—in general terms—of the significance of Article 134 offenses. As noted in *Woods*, Article 134 is explained carefully to each service member on initial entry into the service and again after six months of service, thus putting each service member on fair notice that conduct which is prejudicial to good order and discipline is punishable. Third, the government showed that Morris was put on fair notice of the consequences of unprotected sexual intercourse. Several people testified at trial that they had counseled Morris about his infection and had explained that HIV can be transmitted through unprotected sex.¹¹⁰

The court devoted more time to Morris' second issue on appeal, the troublesome issue of consent. Morris' sexual partner, a servicewoman, testified that at the time of their relationship she knew Morris had tested positive for HIV. She also knew it was possible for HIV to be transmitted through unprotected sexual intercourse, and that the infection can be fatal. Despite that knowledge, she consented to having unprotected sexual intercourse with Morris on many occasions.¹¹¹

The ACMR considered the issue of whether consent constituted a valid defense to the charge of wanton disregard for human life in violation of Article 134. After receiving briefs on the issue, the ACMR concluded that consent was not a defense. The ACMR seemed to hold that consent is not much of a consideration at all.

First, the ACMR referred to the NCMCMR's analysis in *Woods*. The essence of the offense alleged both in *Morris* and in *Woods* was engaging in unprotected sexual intercourse, knowing that to do so was an inherently dangerous act likely leading to death or grievous bodily harm. The ACMR adopted the NCMCMR's findings that, under the circumstances, this conduct was prejudicial to the good order and discipline in the Armed Forces, satisfying a violation of Article 134.¹¹²

Second, the ACMR stepped outside the military arena and examined the societal—rather than purely military—interests

¹⁰⁴ *Id.* (quoting *United States v. Sadinsky*, 34 C.M.R. 343, 346 (C.M.A. 1964)).

¹⁰⁵ Milhizer, *supra* note 22, at 20.

¹⁰⁶ UCMJ art. 137 (1988).

¹⁰⁷ *Woods*, 28 M.J. at 320.

¹⁰⁸ 30 M.J. 1221 (A.C.M.R. 1990).

¹⁰⁹ *Id.* at 1224-25.

¹¹⁰ *Id.* at 1225.

¹¹¹ *Id.* at 1228.

¹¹² *Id.*

involved in Morris' type of offense. "[T]he deterrence of appellant and others from further reckless behavior and stopping the spread of a deadly disease"¹¹³ was the focus of the prosecution. Negating consent as an issue in an Article 134 case, the ACMR proclaimed, "[w]e believe that society has an interest in preventing such conduct as committed by appellant in this case, whether the victim consents or not."¹¹⁴

What will be the next challenges to prosecutions under Article 134? Perhaps *Morris* and *Woods* have taken care of any uncertainty—sexual relations involving HIV are not acceptable to the military community, even if the relations are nondeviant, heterosexual, and involve two unmarried people. These two cases may mean that in the near future, unprotected sexual relations by an HIV-positive service member who does not warn his sexual partner may be a violation of Article 134 as commonly recognized as adultery, cohabitation, and prostitution.

Assault and Aggravated Assault

The COMA specifically has approved of using a charge of aggravated assault under Article 128 to support the convictions of HIV-infected service members. Under Article 128, an accused is guilty of aggravated assault if he or she "commits an assault with a . . . means . . . likely to produce death or grievous bodily harm."¹¹⁵ The test case for the COMA was *United States v. Stewart*,¹¹⁶ decided in September 1989.

Stewart was charged with having committed on numerous occasions assault on a female soldier "by wrongfully exposing her to the human immunodeficiency virus . . . with a means likely to produce death or grievous bodily harm," while knowing he was infected with HIV and knowing that the virus can be sexually transmitted.¹¹⁷

Stewart pleaded guilty to the charges. He admitted that he knew he was HIV-positive, had received counseling about the

dangers of exposing others to AIDS, and had engaged in unprotected sexual intercourse with the victim which was a wrongful and unlawful action on his part.¹¹⁸

In aggravation, the government called as a witness Major Jane L. Bell, a nurse with a master's degree in public health. She testified that the victim had contracted HIV as a result of having sexual intercourse with Stewart. She also stated that, according to current medical knowledge, between thirty and fifty percent of people infected with HIV eventually would develop the fatal AIDS disease.¹¹⁹ The government used Bell's testimony to show that the means alleged—unprotected sexual intercourse—was a means of assault likely to produce death or grievous bodily harm to the victim.

Stewart appealed to the ACMR, claiming that the military judge erred in accepting as provident his plea of guilty to aggravated assault "where evidence offered by the government in aggravation of sentence established that the 'means' alleged was not a means 'likely' to produce death or grievous bodily harm."¹²⁰ The ACMR modified the sentence but otherwise affirmed.¹²¹ The COMA likewise affirmed Stewart's conviction. The COMA held that "the pleas were not rendered improvident since even a 30 to 50% chance of death resulting from the battery inflicted is sufficient to fall within 'the natural and probable consequence' definition."¹²²

The COMA did not indicate in *Stewart* at what point the chance of death from AIDS would be too remote to support a conviction for aggravated assault. The remoteness of death is the root of the problem when using theories of murder or manslaughter for prosecution. Both murder and manslaughter cannot be charged until the victim is dead and death from AIDS normally occurs years after the initial infection with HIV. Consequently, any charges that may be brought in the future based on murder or manslaughter likely will focus on attempt, rather than on the crimes themselves.¹²³

Likewise, the COMA did not decide whether unprotected sexual contact without any evidence of transmission of HIV to

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ UCMJ art. 128 (1988).

¹¹⁶ 29 M.J. 92 (C.M.A. 1989).

¹¹⁷ *Id.* at 93.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 92.

¹²¹ No. 8702932 (A.C.M.R. 9 Sept. 1988) (unpub.).

¹²² *Stewart*, 29 M.J. at 93. See MCM, *supra* note 36, pt. IV, para. 54c(4)(a)(ii).

¹²³ For an excellent discussion of possible theories of prosecution, see Wells-Petry, *supra* note 42.

the victim could constitute assault. The COMA decided both of these issues six months later in *United States v. Johnson*.¹²⁴

After Johnson was diagnosed as HIV-positive he underwent extensive counseling on the significance of being HIV-positive, the methods of transmitting the infection, and the reasons for using barrier protection during sex. He acknowledged in writing that he would inform sexual partners of his condition prior to sexual activity and utilize appropriate protective measures. He did not receive the safe-sex order.¹²⁵

Approximately three months after his diagnosis, Johnson performed fellatio on a seventeen-year-old civilian male and attempted to have unprotected anal sodomy with the same person but was unable to achieve penetration.¹²⁶ Johnson was convicted of attempted consensual sodomy, consensual sodomy, and assault with a means likely to produce death or grievous bodily harm—attempted anal intercourse while knowingly infected with HIV—in violation of Articles 80, 125, and 128 of the UCMJ.¹²⁷

The AFCMR approved the conviction but modified the sentence. The AFCMR analyzed the proposition “assault by AIDS virus” carefully within the requirements of aggravated assault with a means likely to produce death or grievous bodily harm.

“Means” The AFCMR had no trouble finding that Johnson had used a means likely to produce death or serious bodily harm. In reviewing both military and civilian case law, the AFCMR found that disparate items such as spatulas, tape recorders, and vicious dogs had been held actionable. In light of those precedents, the AFCMR found that “semen carrying the HIV virus indeed can be a ‘means’ to commit aggravated assault.”¹²⁸

“Used” The AFCMR found that the “means” was “used” when Johnson placed his penis near the victim’s anus seeking sexual gratification.¹²⁹

“Death or Grievous Bodily Harm as a Likely Result” The AFCMR was “confident” that the means was used in such a manner that death or grievous bodily harm would be a likely result. In answering the question how likely is “likely,” the AFCMR found that the expert testimony at trial showed a degree of probability sufficient to sustain a conviction.¹³⁰

Knowledge Johnson had received in-depth counseling, was aware that his semen was highly likely to contain the HIV virus, and that he could transmit a deadly disease to others through sexual contact.¹³¹

Overt Acts Beyond Mere Preparation The AFCMR was convinced that Johnson’s acts rose to this level. The court found that Johnson clearly intended to have anal intercourse with the victim, and that he in fact attempted to place his semen inside the victim’s anus.¹³²

Consent Johnson argued that he could not be guilty because the victim had consented to the sexual acts. The AFCMR did not find this argument persuasive. Because the victim did not know that Johnson was infected, his consent was uninformed. The AFCMR affirmed the finding of the military judge that consent by the victim is not a valid defense when the conduct is of a nature dangerous to the public as well as to the party assaulted.¹³³

The COMA affirmed. The COMA defined “likely” as being at least more than “a fanciful, speculative, or remote possibility.”¹³⁴ As in *Stewart*, the COMA relied heavily on expert testimony adduced at trial that showed that an individual who tests positive for HIV can pass the infection to others, that a person who tests positive for HIV has a thirty-five percent probability of developing AIDS, and that the mortality rate for those with AIDS was fifty percent.¹³⁵

¹²⁴ 27 M.J. 798 (A.F.C.M.R. 1988), *aff’d* 30 M.J. 53 (C.M.A. 1990), *cert. denied*, 111 S. Ct. 294 (1990).

¹²⁵ *Johnson*, 27 M.J. at 800-01.

¹²⁶ *Id.* at 801.

¹²⁷ *Johnson*, 30 M.J. at 54.

¹²⁸ *Johnson*, 27 M.J. at 802.

¹²⁹ *Id.* at 803.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 803-04.

¹³⁴ *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990).

¹³⁵ *Id.* at 55.

The COMA made an interesting comment at the end of its decision on the status of AIDS cases nationwide:

[W]e offer the following thoughts. The cases of *Stewart*, *Womack*, and *Woods* stand for the proposition that the military has a legitimate interest in prosecuting unprotected sexual contact which involves the risk of transmitting the AIDS virus. They do not stand for the proposition that persons infected with AIDS will be criminally stigmatized and punished more severely when their conduct does not risk transmission of the virus. An era of heightened awareness should not be transposed into irrational fear, particularly in criminal law, whether in the military or civilian communities.¹³⁶

The COMA made this remark in response to several reported incidents where civilian judges had required defendants infected with HIV to enter guilty pleas over the telephone, or had held court proceedings outdoors, in order to reduce the risk of transmitting the infection.¹³⁷ The judges on the COMA certainly appear to have been better informed about the means of spreading AIDS than were their civilian counterparts.

Can an infected service member be convicted of aggravated assault even though he used a condom during intercourse? The NMCMR thinks so. The NMCMR upheld the conviction of John Joseph for aggravated assault on a female naval reservist, even though he had used a condom during intercourse, because he had not informed his partner of his HIV infection.¹³⁸

The NMCMR focused on the nature of HIV itself in making its ruling. Joseph had received medical counseling after testing HIV-positive. The counseling indicated that sexual intercourse would be safer when nonoxynol-9, a spermicide, was used with a condom. The information provided, however, stressed that HIV is transmitted through sexual intercourse, and the only way to prevent transmission was to abstain from sex.¹³⁹ Therefore, the NMCMR said, Joseph knew prior to his sexual relations with the victim that sexual

relations with her were unsafe, even when using a barrier method. Consequently, Joseph, in the act of having sexual intercourse, used a means likely to produce death or grievous bodily harm.

Joseph's sentence included a dishonorable discharge, which he claimed was inappropriately severe. The NMCMR disagreed. Notwithstanding Joseph's previous outstanding service record and his indications of remorse for what he had done, because the victim tested positive for HIV and likely would not live a long and normal life, made a dishonorable discharge "particularly appropriate."¹⁴⁰

One issue remaining after *Joseph* is whether an assault would occur when a person gave knowing consent to sexual intercourse with another known to have tested positive for HIV. In a footnote, the NMCMR indicated that assault might lie, for the "general rule . . . is that one cannot lawfully consent to a battery that is likely to produce death or serious bodily harm."¹⁴¹

Can a male who is incapable of transmitting HIV through sexual contact be convicted of aggravated assault arising out of a sexual relationship? The ACMR answered this question in the negative in *United States v. Perez*.¹⁴² Perez tested HIV-positive after having undergone a vasectomy. He informed his sexual partner of the vasectomy when she requested he use a condom during intercourse, but did not tell her he was HIV-positive. Perez was convicted at court-martial of assault consummated by a battery (a lesser included offense of aggravated assault under Article 128) and adultery, an offense under Article 134.

The ACMR set aside Perez' conviction, finding the evidence legally insufficient to support a conviction for assault consummated by a battery. The ACMR found that the government had failed to prove an essential element of the offense: that Perez had the ability to assault the victim by transmitting the HIV virus through his semen.¹⁴³

The ACMR examined the three theories of assault defined in the UCMJ—offer, attempt, and battery—and rejected the application of all three. An offer-type battery had not been committed because the victim had not been placed in reason-

¹³⁶ *Id.* at 58 (footnotes omitted).

¹³⁷ *Id.* n.9.

¹³⁸ *United States v. Joseph*, 33 M.J. 960 (N.M.C.M.R. 1991).

¹³⁹ *Id.* at 962.

¹⁴⁰ *Id.* at 965.

¹⁴¹ *Id.* at 963 n.1.

¹⁴² 33 M.J. 1050 (A.C.M.R. 1991), *reconsid. denied* Jan. 17, 1992.

¹⁴³ *Id.* at 1053.

able apprehension of an immediate unlawful touching of her person; she did not know of Perez' infection until long after the sexual encounters, and the encounters occurred with her consent.¹⁴⁴ The ACMR found that under both the attempt and battery theories, consensual sexual intercourse is not offensive touching; "the ability to place the HIV-virus in the body of an unaware victim is the offensive touching."¹⁴⁵ The defense expert had testified that because of Perez' vasectomy he could not transmit HIV during sexual intercourse. The ACMR found the evidence legally insufficient to support a conviction of assault under either attempt or battery theories because of the failure of proof of this critical element.¹⁴⁶

Can an HIV-infected service member who fails to ejaculate during sexual intercourse be convicted of aggravated assault? The accused in *United States v. Schoolfield*¹⁴⁷ claimed his case was indistinguishable from *Perez* because both he and Perez were incapable of transmitting the HIV virus to the victim—Schoolfield because he withdrew his penis from the vagina before ejaculation—Perez because of his vasectomy. The ACMR, however, found *Perez* distinguishable, and affirmed Schoolfield's conviction.

The government's expert witness presented evidence at trial that a male can transmit the HIV virus through both pre-ejaculation fluid and semen. The defense expert testified that the HIV virus is present only in the seminal fluid present only on ejaculation. The "battle of the experts" was for naught, because the ACMR found that whether Schoolfield ejaculated had little to do with proving the elements of aggravated assault.

Schoolfield had intercourse with the victims, was HIV positive, and was capable of transmitting the virus when he put his penis in a victim's vagina. These facts alone satisfied the elements of aggravated assault set out by the COMA in *United States v. Johnson*: bodily harm is defined as an offensive touching, and in an HIV-positive assault, the offensive touching is the exposure of the victim to the HIV virus that can produce death or grievous bodily harm.¹⁴⁸ The ACMR compared the situation in *Schoolfield* to that of the soldier pointing a loaded gun at the victim. "In this case, by analogy, because he is HIV positive, the appellant's gun is loaded and he assaults his victims by merely placing his penis in their vagina, whether or not he ejaculates in them."¹⁴⁹ *Schoolfield* is distinguishable from *Perez* because Schoolfield was capable of transmitting the HIV virus through the act of sexual intercourse, while Perez could not because of his vasectomy.

Conclusion

The military has taken a lead in this country in trying to stop the spread of AIDS. The military has taken upon itself the duty to protect not only its own, but all of society from harm. The leaders of the armed forces have taken a multi-tiered approach to the problem: testing, education, and medical care. The military's approach through its judicial system has been an active one; prosecutors have been creative in using a wide variety of prosecutorial theories, both those unique to the military and those with civilian counterparts, to deter and to punish.

A few questions remain unanswered thus far in the military case law. How does the safe-sex order affect sexual relations between married couples? Could successful prosecutions be brought for murder or manslaughter, or attempts to commit these crimes? Does an assault action lie when a person consents to an act of unprotected sexual intercourse with a service member who has disclosed that he or she is infected with HIV? Will potential cases involving female perpetrators raise new issues, or be decided any differently? Every accused but one who has faced the appellate courts has remained convicted, despite different theories and different circumstances. The common thread leading to conviction is the ability to transmit the HIV virus through sexual relations. Difficulty exists in knowing how the consent of a sexual partner will affect that thread.

Although the safe-sex order and the general article are not prosecutorial tools available to civilians, prosecution under criminal statutes is. State and federal governments would do well to examine the military cases, and take advantage of the experience that the COMA has had with the issues of HIV-related sexual conduct. Every state has an Edward Savitz, who may not have been deterred, but who surely can be punished, by statutes specifically directed to the sexual transmission of AIDS.

While some claim that the military is a discrete and insular unit of society with little in common with civilians, the AIDS epidemic crosses the boundary between military and civilian worlds, and does not discriminate. The military is protecting both societies by active testing, education, and prosecution. Perhaps now is the time for the state and federal components of civilian society to start protecting both societies, as well.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ No. 9101417 (A.C.M.R. 13 Nov. 1992).

¹⁴⁸ *Id.* (citing *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990)).

¹⁴⁹ *Id.*

United States v. Berri: The Automatism Defense Rears Its Ugly Little Head

Major Michael J. Davidson
42d Graduate Class, TJAGSA
and

Captain Steve Walters
National Guard Bureau

Introduction

A common belief among young soldiers living in the barracks, propagated by the "barracks lawyer," is that a soldier could not be court-martialed for striking someone attempting to wake him if such conduct occurs in the first few seconds of waking. While simplistic, this belief contains a kernel of truth.¹ In *Fain v. Commonwealth*,² the defendant, while asleep in a hotel lobby, shot and killed a porter who was attempting to wake the defendant. The Kentucky Court of Appeals reversed Fain's murder conviction after the trial court refused to receive evidence that the defendant was a sleep-walker and instruct the jury on an unconsciousness defense.³

Similarly, a soldier who commits what otherwise would be a criminal act, is not guilty of a crime if the conduct occurs while the individual is not conscious of what he or she is doing. Such a mental state forms the basis of the automatism defense.

In *United States v. Berri*,⁴ the United States Court of Military Appeals (COMA) recognized the validity of the automatism, or "unconsciousness," defense, but specifically declined to define its parameters under the Uniform Code of Military Justice.⁵ Other courts and commentators have described automatism as a defense of unconsciousness, a lack of intent,

or simply that the behavior does not amount to a criminal act at all.⁶

This article will discuss the defense of automatism and review its treatment by both the military and civilian jurisdictions.

Defining the Defense

Fundamental to our system of criminal justice is the principle that to hold someone criminally responsible for misconduct, such action must have been the product of a "free will" and the challenged action be "voluntary."⁷ Our legal system disfavors assessing criminal responsibility against a defendant who "is not a free agent, or is unable to choose or to act voluntarily, or to avoid the conduct which constitutes the crime . . ."⁸

The automatism defense refers to the situation when an individual engages in conduct that otherwise would be considered criminal, but is not guilty of the charged offense because that individual acted in a state of unconsciousness or semi-consciousness.⁹ The term applies to actions apparently occurring without will, purpose, or reasoned intent.¹⁰ The defense is broad enough to encompass a wide range of conduct to include: acts performed while asleep, while suffering from a

¹ See G. WILLIAMS, CRIMINAL LAW 484-85 (2d ed. 1961) ("where the defendant has attacked another during sleep, there is generally no doubt that he is not responsible in law . . ."), cited in *Salzman v. United States*, 405 F.2d 358, 364 n.2 (D.C. Cir. 1968).

² 78 Ky. 183 (1879).

³ *Watkins v. Commonwealth*, 378 S.W.2d 614, 615 (Ky. Ct. App. 1964) (discussing *Fain*).

⁴ 33 M.J. 337 (C.M.A. 1991).

⁵ *Id.* at 341 n.9. Previously, in dicta, the COMA recognized automatism as a possible defense when the accused was suffering from "epileptic fugue" during the charged misconduct. *United States v. Olivera*, 15 C.M.R. 134, 138 (C.M.A. 1954) ("an epileptic fugue would tend strongly to reflect an absence of criminality—because an epileptic, during a seizure, is ordinarily acting with virtually complete automatism").

⁶ *Corrado, Automatism And The Theory Of Action*, 39 EMORY L.J. 1191 (1990); *Morris, The Planter's Dream*, 40 U. CHI. L. REV. 609, 620 (1982) ("simply no criminal guilt"); 40 AM. JUR. 2D *Homicide* § 116 (1968) (cannot form a criminal intent).

⁷ *United States v. Moore*, 486 F.2d 1139, 1240, n.182 (D.C. Cir. 1973) (citations omitted); *Salzman v. United States*, 405 F.2d 358, 364 (D.C. Cir. 1968); *State v. Breakiron*, 532 A.2d 199, 201 (N.J. 1987) ("a voluntary act and a culpable state of mind [are] the minimum conditions for liability"); *State v. Caddell*, 215 S.E.2d 348, 366 (N.C. 1975) (Sharp, Chief J., concurring in result and dissenting in part) (a voluntary act is an "absolute requirement for criminal liability"). The fundamental requirement of "voluntary" action is premised on the common law concept of *mens rea*, *actus reus*, or a combination of the two. *Moore*, 486 F.2d at 1241 n.182 (citations omitted).

⁸ *Moore*, 486 F.2d at 1241.

⁹ *Williams v. Gupton*, 627 F. Supp. 669, 671 n.1 (W.D. N.C. 1986) (citing *State v. Mercer*, 165 S.E.2d 328 (N.C. 1969)). *Black's Law Dictionary* defines automatism as "Behavior performed in a state of mental unconsciousness or dissociation without full awareness, i.e., somnambulism, fugues." BLACK'S LAW DICTIONARY 134 (6th ed. 1990). In *Bratty v. Attorney-General for Northern Ireland*, 3 W.L.R. 965, 972 (1961) a British court of appeals defined automatism as "connoting the state of a person who, though capable of action, is not conscious of action, and it is a defense because the mind does not go with what is being done." S. GLUECK, LAW AND PSYCHIATRY 56-7 n.32 (1962).

¹⁰ BLACK'S LAW DICTIONARY 134 (6th ed. 1990).

delirium of fever, or caused by an attack of psychomotor epilepsy; physical trauma such as a blow to the head; the involuntary taking of drugs or intoxicating liquor; or emotional trauma.¹¹ When operating in such a state, the accused is acting "automatically" rather than voluntarily.¹² Such an individual would no more be considered guilty of a crime than one whose actions were the result of a spasm.¹³

Actus Reus

In *Berri*, the COMA properly viewed automatism as a defense primarily in terms of the *actus reus*, or criminal act. To be found guilty of a charge, the criminal act must have been voluntary.¹⁴ Voluntariness implies consciousness and a bodily movement during a period of unconsciousness is not, by definition, a voluntary act.¹⁵ Occurrences that take place independently of the will are classified more properly as "events," rather than "acts" because an absence of volition exists.¹⁶ An "act" requires a "willed" movement or the omission of a possible and legally-required performance.¹⁷ Accordingly, as one legal commentator has opined:

If a person engages in conduct that would otherwise be criminal but does so without any exertion of will then there is no act. Thus, a person who acts under a hypnotic suggestion or in a somnambulistic state or a

bodily movement not otherwise willed, such as in a state of automatism does not commit an 'act' that gives rise to criminal liability.¹⁸

Mens Rea

Within the American system of justice, legal "insanity" requires a "mental disease or defect of such nature and degree as to meet the legal requirements for acquittal of the offense charged in the jurisdiction."¹⁹ Insanity serves as an absolute criminal defense because it negates "*mens rea*," an element of any criminal defense.²⁰

Paralleling the *M'Naghten* rule,²¹ the current military insanity test²² requires an accused to prove that "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts."²³ If an accused satisfies the insanity test, he or she will be found "not guilty only by reason of lack of mental responsibility."²⁴

The law is unsettled as to whether automatism constitutes a form of insanity. The majority of authorities distinguish automatism from insanity because the unconsciousness at the time of the alleged criminal action need not be the result of a

¹¹ See *State v. Jennifer*, 451 N.W.2d 710, 721 (S.D. 1990); Corrado, *supra* note 6, at 1191 (citing CALIFORNIA JURY INSTRUCTION 4.30 (5th ed. 1988)); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 44, at 337 (1972) (epileptic and postepileptic states, organic brain disease, concussions, schizophrenic and acute emotional disturbance, anoxia and hypoglycemia, sleepwalking, and hypnagogic states).

In *Regina v. Quick*, 3 W.L.R. 26 (1973), the defendant attempted to plead automatism due to hypoglycemia as a defense to the charge that he assaulted a patient, alleging that his behavior was the result of a sudden drop in blood sugar due to an overdose of insulin, coupled with consumption of some alcohol and lack of food. F. CAMPS, GRADWOHL'S LEGAL MEDICINE 40 (3d ed. 1976). A British court of appeals set aside the assault conviction, holding that automatism was a defense that should have gone to the jury. *Id.* See also Corrado, *supra* note 6, at 1191. In *Charlson's Case*, 1 All E.R. 859 (1955), a British court regarded a cerebral tumor as having given rise to a state of automatism, acquitting the defendant of assaulting his son with a mallet. CAMPS, *supra* note 11, at 40; Morris, *supra* note 6, at 609, 620-21, 642 (1982).

¹² PERKINS & BOYCE, CRIMINAL LAW 993 (1982).

¹³ *Id.*; see also Morris, *supra* note 6, at 620 (other examples include "a blow by an epileptic given while in a *grand mal*, or a person fainting and falling on someone—neither would be a criminal assault, no matter what the injury").

¹⁴ *United States v. Berri*, 33 M.J. 337, 341 n.9 (C.M.A. 1991) (citations omitted).

¹⁵ *Id.*; see also *United States v. Olvera*, 15 C.M.R. 134, 138 (C.M.A. 1954) ("an epileptic fugue would tend strongly to reflect an absence of criminal liability—because an epileptic, during a seizure, is ordinarily acting with virtually complete automatism").

¹⁶ PERKINS & BOYCE, *supra* note 12, at 607. In the criminal context, the definition of the requisite "act" must be limited to action which denotes an external manifestation of the actor's "will." *Id.*

¹⁷ *Id.* at 837.

¹⁸ *Id.* at 611 (citations omitted).

¹⁹ *Id.* at 985.

²⁰ *Id.*; see also *Ellis v. Jacobs*, 26 M.J. 90, 91 (C.M.A. 1988) ("offenses . . . generally contain at least one *mens rea* element").

²¹ See *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). The *M'Naghten* rule requires that, at the time of the offense, the defendant suffered from a disease of the mind so "as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722.

²² The accused has the burden of proving insanity by clear and convincing evidence. UCMJ art. 50b (1988); cf. *State v. Woodard*, 404 S.E.2d 6, 11 (N.C. Ct. App. 1991) (Automatism—or unconsciousness—is an affirmative defense and the defendant has the burden to establish this defense, not beyond a reasonable doubt, but merely to the satisfaction of the jury) (citing *State v. Jerrett*, 307 S.E.2d 339, 353 (N.C. 1983); *State v. Caddell*, 215 S.E.2d 348, 370 (N.C. 1975)).

²³ UCMJ art. 50a (1988).

²⁴ *Id.* 50c(3), d(3); cf. *Woodward*, 404 S.E.2d at 6 ("not guilty by reason of unconsciousness").

mental disease or defect, and a criminal defendant found not guilty by reason of unconsciousness—as distinct from insanity—is not subject to commitment to a mental health institution.²⁵ Indeed, automatism may be manifested in someone with a perfectly healthy mind.²⁶ Further, no follow-on consequences subsequent to an acquittal based on an automatism defense exist, however, an accused acquitted by reason of insanity ordinarily is committed to a mental institution.²⁷

The minority view rejects such distinctions and treats automatism as a form of the insanity defense.²⁸ In *Loven v. State*,²⁹ the Texas Court of Appeals specifically held that a defendant who commits a criminal act while in a state of unconsciousness or automatism—in this case an epileptic seizure—may raise the defense of insanity.³⁰ Similarly, in *Lucas v. Commonwealth*,³¹ the Virginia Supreme Court of Appeals characterized automatism in terms of an insanity defense.³²

Application of the Defense Generally

Regardless of its applicability as an insanity defense, automatism can form the basis of a complete defense against virtually any charged misconduct. Because an automatic act is not voluntary, the accused can entertain neither the specific nor general intent necessary to be guilty of a crime.³³ While reported cases are few, and largely reflect appeals of an unsuccessful defense, automatism has been attempted under a number of legal theories, including somnambulism, epileptic seizure, hypnosis, trauma, claustrophobic panic attack, and amnesia.

Somnambulism

Somnambulism, or sleepwalking,³⁴ can form the basis of an automatism defense,³⁵ and has been used, albeit unsuccessful—

²⁵ *Williams v. Guppton*, 627 F. Supp. 669, 671 n.1 (W.D.N.C. 1986) (citing *Caddell*, 215 S.E.2d at 348); *State v. Jenner*, 451 N.W.2d 710, 721 (S.D. 1990) (“separate and distinct”); *Jerrett*, 307 S.E.2d at 339, 353 (N.C. 1983); *Fulcher v. State*, 633 P.2d 142, 145, 147 (Wyo. 1981); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962); *Caddell*, 215 S.E.2d at 360 (legislation in California, Oklahoma, Arizona, Idaho, Montana, Nevada, South Dakota, and Utah distinguish between insanity and automatism); see also *LAFAVE & SCOTT*, *supra* note 11, at 337 (“related to but different from the defense of insanity”); *PERKINS & BOYCE*, *supra* note 12, at 994; 40 AM. JUR. 2D *Homicide* § 116 (1968) (entirely distinct defenses); *Morris*, *supra* note 6, at 620 (“This is not a defense of insanity—there is simply no criminal guilt”); cf. *Commonwealth v. Williams*, 571 N.E.2d 29, 34 n.9 (Mass. 1991) (citing *Commonwealth v. Genius*, 442 N.E.2d 1157, 1160 (Mass. 1982) (“This ‘defense’ to date not recognized as such in this Commonwealth . . . differs from an ‘insanity defense’ and from a claim of diminished capacity”). The British courts have recognized two types of automatism, “insane” and “noninsane.” Automatism as a result of a disease of the mind—such as psychomotor epilepsy—would qualify as a form of insanity. *GLUECK*, *supra* note 9, at 56-7 n.32; *Slodov, Criminal Responsibility And The Noncompliant Psychiatric Offender: Risking Madness*, 40 CASE W. RES. L. REV. 271, 283 (1989-90) (“Epilepsy has been treated as a mental disease for the purposes of the insanity defense as well as the basis of an involuntary act defense”).

²⁶ *Jenner*, 451 N.W.2d at 721; *PERKINS & BOYCE*, *supra* note 12, at 994; 40 AM. JUR. 2D *Homicide* § 116, at 410-11 (1968) (citations omitted).

²⁷ *Fulcher*, 633 P.2d at 145.

²⁸ See *PERKINS & BOYCE*, *supra* note 12, at 994-95 (distinction “does not sound convincing”) (citing *Tibbs v. Commonwealth*, 128 S.W. 871, 874 (Ky. 1910) (somnambulism)).

²⁹ 831 S.W.2d 387 (Tex. Ct. App. 1992).

³⁰ *Id.* at 391 (citing *Bradley v. State*, 277 S.W. 147, 148-50 (Tex. Crim. 1925) (somnambulism recognized as a form of insanity); *Zimmerman v. State*, 215 S.W. 101, 105-06 (Tex. Crim. 1919) (epileptic insanity)); cf. *United States v. McCracken*, 488 F.2d 406, 410 (5th Cir. 1974) (evidence of psychomotor epilepsy involving automatism sufficient to raise issue of insanity).

³¹ 112 S.E.2d 915 (Va. 1960) (murder case in which the defendant allegedly suffered from epilepsy and chronic alcoholism).

³² *Id.* at 920-21.

³³ *Polston v. State*, 685 P.2d 1, 5 (Wyo. 1984); *State v. Jerrett*, 307 S.E.2d 339, 353 (N.C. 1983) (“automatism is a complete defense to a criminal charge . . . because ‘[t]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability’”); *BLACK’S LAW DICTIONARY* 134 (6th ed. 1990) (“automatism may be asserted as a criminal defense to negate the requisite mental state of voluntariness for commission of a crime”); *Greenfield v. Commonwealth*, 204 S.E.2d 414, 417 (Va. 1974) (“Where not self-induced, unconsciousness is a complete defense to a criminal homicide”); *Smith v. Commonwealth*, 268 S.W.2d 937, 938 (Ky. Ct. App. 1954) (“It is a well-recognized principle of criminal law that, if a person is unconscious at the time he commits a criminal act, he cannot be held responsible”).

³⁴ Somnambulism “or walking in one’s sleep, is a species of mental unsoundness connected with sleep, which is declared to produce a temporary state of involuntary intoxication that destroys moral agency during the period of its existence.” 41 AM. JUR. 2D *Incompetent Persons* § 2, at 544 (1968); cf. *United States v. Larkin*, 27 C.M.R. 766, 772 (1959) (described as a form of hysteria involving the disturbance of consciousness).

³⁵ *Lewis v. State*, 27 S.E.2d 659, 665 (Ga. 1943) (unless artificially induced, “it is recognized that sleepwalking or somnambulism may constitute a defense to a criminal charge . . .”); 40 AM. JUR. 2D *Homicide* § 116 (1968) (“In a few instances somnambulism has been recognized as a defense to homicide, being sometimes regarded as equivalent to unconsciousness, and sometimes as an instance of insanity”) (citing *People v. Methever*, 64 P. 481 (Cal. 1901) *disapproved on other grounds* in *People v. Gorshen*, 336 P.2d 492 (Cal. 2d. 1959); *Tibbs v. Commonwealth*, 128 S.W. 871 (Ky. 1910); *J. MILLER, HANDBOOK OF CRIMINAL LAW* § 41 at 135 (1934) (recognizing sleepwalking as a defense because if unconscious, the defendant cannot be held to possess criminal intent) (citations omitted); *PERKINS & BOYCE*, *supra* note 12, at 611 (citing *Bradley v. State*, 277 S.W. 147 (Tex. Crim. 1925); cf. *Stewart v. Peters*, 958 F.2d 1379, 1387 (7th Cir. 1992) (recognizing in dicta that status as an automaton or sleepwalker negates intent); *United States v. Bailey*, 585 F.2d 1087, 1118 (D.C. Cir. 1978) (Wilkey, J., dissenting) (act performed while asleep is involuntary)).

ly, in at least one military courts-martial.³⁶ Courts have held that a defendant is not guilty of murder if the defendant killed the victim while the defendant was asleep or while in the semi-conscious state between sleeping and waking.³⁷ Similarly, no criminal liability should attach to the actions of an accused who commits a crime while sleepwalking even when such conduct arguably was purposive and regarded as expressing an unconscious desire.³⁸

In *United States v. Foster*,³⁹ the accused was convicted of committing sodomy with and indecent acts on his daughter,⁴⁰ despite his contention that if any sexual touching of his daughter occurred, it did so during sleepwalking.⁴¹ The accused established that he had been diagnosed as a sleepwalker and testified that he awoke in his daughter's room with no recollection of having touched her.⁴² Further, a defense expert on sleep disorders testified that the accused's story was more consistent with the characteristics of a sleepwalker than the testimony of the victim.⁴³ In what appears to have been a credibility determination, the court members accepted the daughter's testimony, rejecting the accused's sleepwalking defense.⁴⁴

Most jurisdictions, including the military, recognize that an epileptic seizure renders an accused unable to form the *mens rea* required for conviction.⁴⁵ The condition does not lend itself to correction or punishment and no societal interest is advanced by punishing an act over which the accused has no control.⁴⁶ Merely possessing an underlying epileptic condition, however, is no defense to a crime. The accused still must establish that the particular offense committed was caused by such a seizure.⁴⁷ Evidence of conduct indicating a seizure *after* the alleged misconduct has been held not to satisfy this burden.⁴⁸ Further, epileptics who are aware of their propensity for seizure may be held criminally responsible for conduct occurring during a seizure when they recklessly disregard this condition or cause their own incapacity by failing to take prescribed medication designed to control it.⁴⁹

In *United States v. Rooks*,⁵⁰ the accused pleaded guilty to charges of unauthorized absence, escape from confinement, and assault with a means likely to produce grievous bodily

³⁶ See *United States v. Foster*, 1993 WL 76323 (AFCMR). In *United States v. Stanley*, 36 M.J. 896 (A.F.C.M.R. 1993), an accused was convicted of four counts of indecent assault after touching the buttocks or penis of three members of his squadron. The accused had attempted unsuccessfully to excuse such conduct by presenting expert testimony that he suffered from a disassociative disorder rooted in childhood sexual abuse, which caused the accused to act out his sexual conflicts in a "dream-like state." *Id.* at 897.

³⁷ *LAFAVE & SCOTT*, *supra* note 11, § 25, at 180 (1972) (citing *Fain v. Commonwealth*, 39 Am.Rep. 213 (Ky. 1879); *Bradley*, 277 S.W. at 147).

³⁸ *Id.*

³⁹ *Foster*, 1993 WL 76323 at *1.

⁴⁰ *Id.* Specifically, the accused touched his seventeen-year-old daughter's breasts and vaginal area, placed his mouth on her vaginal area, and placed her hands on his penis, moving them until he ejaculated. *Id.* at *1-2.

⁴¹ *Id.* at *2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *United States v. Rooks*, 29 M.J. 291, 292 (C.M.A. 1989), *appeal after remand*, 32 M.J. 25 (C.M.A. 1990); cf. *United States v. Smedley*, 35 C.M.R. 146, 147 (C.M.A. 1964) ("accused committed the offenses charged during an epileptic seizure, which rendered him incapable of meeting the standards laid down in military law for mental responsibility"); *United States v. Olvera*, 15 C.M.R. 134, 138 (C.M.A. 1954) (epileptic fugue reflects an absence of criminal liability); *United States v. Johnson*, 14 C.M.R. 143, 148 (C.M.A. 1954) ("An epileptic seizure which produces an offense, would, of course, constitute a defense"); *Government of the Virgin Islands v. Smith*, 287 F.2d 169, 174 (3d Cir. 1960) (recognizing that unconsciousness may negate *mens rea*); *State v. Welsh*, 508 P.2d 1041 (Wash. Ct. App. 1973) (goes to intent).

⁴⁶ *Rooks*, 29 M.J. at 292.

⁴⁷ *Johnson*, 14 C.M.R. at 148; *Starr v. State*, 213 S.E.2d 531, 532 (Ga. Ct. App. 1975) ("no testimony that [defendant] was having an epileptic seizure at the time of shooting the deceased"). In *People v. Jandelli*, 455 N.Y.S.2d 728 (Misc. 2d 1982), a defendant accused of murdering his sister claimed that at the time of the acts he was suffering from Penfield's Automatism, a type of epileptic seizure during which the individual moves in a robot-like manner and performs aimless, undirected acts of which he has little, if any, recollection. The prosecution defeated the defense through psychiatric testimony that defendant's conduct and detailed recollection were inconsistent with such an epileptic seizure. *Id.* at 733.

⁴⁸ *Starr*, 213 S.E.2d at 532.

⁴⁹ *Slodov*, *supra* note 25, at 283-85 (1989-90) (citations omitted); see also *infra* text accompanying "Application of the Defense in the Military."

⁵⁰ 29 M.J. 291 (C.M.A. 1989), *appeal after remand*, 32 M.J. 25 (C.M.A. 1990).

harm.⁵¹ During the providence inquiry, the accused testified that he could not remember any of the details of the assault and had "blacked-out" under circumstances closely tracking the symptoms of an hypothalamic epileptic seizure.⁵² Noting that the record failed to indicate that a prior sanity board had considered the possibility of epilepsy, and holding that seizures attendant to epilepsy rendered an accused unable to form the *mens rea* necessary for conviction, the COMA remanded the case for further consideration.⁵³

Hypnosis

Hypnotism⁵⁴ is not a recent phenomenon and has been recognized for centuries.⁵⁵ It has been used as a form of entertainment, by psychiatrists such as Sigmund Freud to study the subconscious mind, and by investigators to retrieve the repressed recollections of witnesses.⁵⁶ Indeed, as early as the 1860s, an Italian prosecutor used the statements of an assault victim, made while under hypnosis, to convict the accused.⁵⁷

Numerous critics of a hypnosis-based defense argue that hypnosis should not excuse criminal behavior because no one can be forced, under hypnosis, to perform an act contrary to their basic nature.⁵⁸ Regardless of such challenges, the courts have recognized that an automatism defense is theoretically available to an accused who engages in involuntary acts while in a hypnotic state.⁵⁹

In *United States v. Phillips*,⁶⁰ the defendant wounded two United States marshals in an attempt to effect the escape of her husband as he was brought into a federal courthouse for trial on a bank robbery charge.⁶¹ At trial, the defendant's husband called into question her mental state at the time of the shooting, testifying that he had gained total control of his wife's mind by hypnotizing her repeatedly over a period of years, and that she had shot the marshals while under the influence of his hypnotic compulsion.⁶²

⁵¹ *Id.* (violating UCMJ arts. 86, 95, 128 (1988)).

⁵² *Id.* at 292. Accused testified that he experienced headaches, blurry vision, and loss of control and memory. Hypothalamic epilepsy—also called rage or furor epilepsy—is characterized by the loss of control of mental faculties while retaining control of motor skills. *Id.*

⁵³ *Id.* at 292-93.

⁵⁴ The American Medical Association has defined hypnotism as:

a temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.

Plotkin, *The Previously Hypnotized Witness: Is His Testimony Admissible?*, 106 MIL. L. REV. 163, 170 (1984) (citing Council on Mental Health, *Medical Use of Hypnosis*, 168 JAMA 186 (1958)); see also BLACK'S LAW DICTIONARY 742 (6th ed. 1990) (characterized by extreme responsiveness to suggestions from the hypnotist).

⁵⁵ *United States v. Robinson*, 26 M.J. 361, 367 (C.M.A. 1988). See also Plotkin, *supra* note 54, at 170 (known since ancient times; first became the subject of study in Europe in the late eighteenth century).

⁵⁶ *Robinson*, 26 M.J. at 367. Police officers began to receive instruction on hypnosis in 1959. Plotkin, *supra* note 54, at 171. Since that time numerous state and federal law enforcement agencies have received training in the use of hypnosis. *Id.*

⁵⁷ W. BRYAN, *LEGAL ASPECTS OF HYPNOSIS* 34 (1962).

⁵⁸ See *People v. Marsh*, 388 P.2d 495, 497 (1959). In *Legal Aspects of Hypnosis*, the author states:

The tremendous majority of experts in the field of hypnosis fully agree that it is impossible to induce a subject, even by the most indirect means, to commit a crime either while under the state of hypnosis or due to a post-hypnotic suggestion. Unless, of course, the subject fully intended to commit such a crime to begin with, and in this case the subject is to blame—not hypnosis.

Bryan, *supra* note 57, at 173; see also LAFAYE & SCOTT, *supra* note 11, at 180 ("there is a difference of opinion as to whether acts during or resulting from hypnosis are actually involuntary, stemming largely from differing views on whether a hypnotised person will engage in acts that are repugnant to him") (citations omitted).

⁵⁹ *People v. Dunigan*, 421 N.E.2d 1319, 1338 (Ill. App. 1981); PERKINS & BOYCE, *supra* note 12, at 611; LAFAYE & SCOTT, *supra* note 11, at 180 (citing *People v. Marsh*, 338 P.2d 495 (Cal. App. 2d 1959) (defense raised at trial, but rejected by jury); cf. Miller, *supra* note 35, at 135 (rejected where attempted, but available as a defense if properly presented); *United States v. Bailey*, 585 F.2d 1087, 1118 (D.C. Cir. 1978) (Wilkey, J., dissenting) (act performed during hypnosis is "involuntary").

⁶⁰ 515 F. Supp. 758 (E.D. Ky. 1981).

⁶¹ *Id.* at 759.

⁶² *Id.* at 760. Alternatively, the defense contended that the hypnosis sessions had deprived the defendant of her capacity to distinguish right from wrong, and that she was legally insane at the time of the shooting. *Id.*

The prosecution successfully rebutted the hypnosis defense by introducing evidence that the defendant had fired a similar weapon at a neighbor several weeks prior to the escape attempt. Such evidence tended to show that the defendant was capable of forming an intent to commit such a violent act at a time when she was not under her husband's influence.⁶³

In *United States v. McCollum*,⁶⁴ the defendant tried to use hypnosis as a defense to a charge of attempted bank robbery. The defendant entered a Los Angeles bank and handed an employee a note demanding \$100,000 and stating that the person delivering the note was under a hypnotic spell.⁶⁵ After being apprehended by police and placed in a patrol car, the accused shook violently for a period of ten to fifteen seconds and then asked one of the officers, "What are you doing? Why am I here?"⁶⁶

At trial, the defendant presented evidence through a forensic hypnotist that he had been drugged by an acquaintance, hypnotized, and instructed to deliver the note and wait for "some papers."⁶⁷ Further, the defendant allegedly was instructed that if detained or questioned by police, his mind would go blank, he would be gripped with fear, he would experience falling, and he would forget everything that had happened to him within the last eight hours.⁶⁸

The prosecution presented expert testimony rebutting the defense's expert witness and opining that the defendant was not a good hypnotic subject.⁶⁹ The jury rejected the hypnosis defense and convicted the defendant.

Trauma

Several legal commentators and court systems, including the military's,⁷⁰ have recognized that automatism caused by severe trauma, such as a blow to the head, may form the basis of a successful defense.⁷¹

In *Polston v. State*,⁷² the defendant was drinking heavily at a nightclub when he saw another man dancing with his girlfriend and punched the individual. A short time later, the defendant became involved in an altercation with another nightclub patron, who kicked the defendant in the head, rendering him unconscious. When he regained consciousness, the defendant was deposited "out the back door of the nightclub."⁷³ Defendant then found his girlfriend, "where in a 'split second' he was on top of [her]," and proceeded to bite off the top two-thirds of her nose.⁷⁴ Polston was convicted of mayhem—a specific intent crime—and sentenced to be incarcerated for three to ten years.⁷⁵

⁶³ *Id.* at 764.

⁶⁴ 732 F.2d 1419 (9th Cir. 1984).

⁶⁵ *Id.* at 1421. After handing an envelope containing the note to the bank employee, the defendant stated, "Open it. I was told to bring it here. I don't know what it is." *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1421-22.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1422. The prosecution also rebutted the defendant's claim that his memory had been hypnotically enhanced prior to trial. *Id.*

⁷⁰ *United States v. Olvera*, 15 C.M.R. 134, 138-39 (C.M.A. 1954); *United States v. Wagoner*, 45 B.R. 13, 23 (1944) (recognizing unconsciousness induced by a blow to the head as a possible defense to murder).

⁷¹ *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981); *Gray v. Commonwealth*, 57 S.W.2d 6 (Ky. 1933) (discussed in *Watkins v. Commonwealth*, 378 S.W.2d 614, 615 (Ky. Ct. App. 1964); *LAFAYE & SCOTT*, *supra* note 11, at 337 (concussional states following head injuries); *cf.* *RUSSELL ON CRIME* 37 (J. Turner ed., 1964) (concussion; British case citations omitted). In *Regina v. Minor*, 15 W.W.R. (n.s.) 433 (Sask. 1955), the defendant suffered a concussion immediately prior to becoming involved in a fatal automobile accident. The appeals court reversed his conviction for manslaughter, holding that if Minor could prove that because he had blacked out he was unable to form an intent—and therefore did not know what he was doing—he could make out a defense separate from insanity, contrary to the jury instructions rendered at trial. *Morris*, *supra* note 11, at 642 (discussing *Minor*). In *United States v. Diehl*, 33 B.R. 143 (1944), however, an Army Board of Review rejected the accused's defense to an absent without leave charge (AWOL) that he suffered from amnesia during the absent period due to two head traumas suffered 13 years and several months prior to his misconduct. The court rejected this defense based on psychiatric testimony that amnesia occasioned by a head injury usually follows the injury rather closely. *Id.* at 151-52; *see also* *United States v. Clark*, 33 B.R. 229, 232-33 (1944) (court rejected defense theory that the accused, charged with AWOL and embezzlement, suffered amnesia due to head injury sustained in an automobile accident months earlier).

⁷² 685 P.2d 1 (Wyo. 1984).

⁷³ *Id.* at 3.

⁷⁴ *Id.* Responding to the woman's screams, on-lookers rushed to the scene and rendered defendant unconscious with an additional blow to the head. Upon regaining consciousness, defendant spit out his girlfriend's nose onto the floor of his pick-up truck, where a deputy sheriff found it the next day. *Id.* at 3-4. Unfortunately, the nose could not be reattached. Interestingly, the victim and the defendant were married at the time of trial. *Id.*

⁷⁵ *Id.* at 2.

The defendant challenged the conviction alleging, in part, that he was entitled to an automatism jury instruction. The Supreme Court of Wyoming affirmed the conviction, relying primarily on a lack of evidence to support an automatism defense.⁷⁶ Significantly, the court articulated the following specific elements necessary to establish a concussion-based automatism defense: (1) the defendant must have an otherwise healthy mind, (2) who, because of a concussion, that (3) resulted from a recent brain injury, and that (4) is a "simple" brain injury devoid of permanent after effects, (5) acts in an unconscious state, (6) in which his or her actions lack criminal intent.⁷⁷ Furthermore, the court would presume that a defendant raising such a defense possessed a healthy mind, and would place the burden of proof squarely on the defendant.⁷⁸ Finally, the court held that automatism was a defense to both specific and general intent crimes, which could be raised on a plea of not guilty. Because, however, the defense involved an abnormal mental condition, the court declared it a "special defense," requiring the defense to give reasonable notice of it to the prosecutor.⁷⁹

Claustrophobic Panic Attack

In *United States v. Campos*,⁸⁰ the accused was charged with willfully disobeying a noncommissioned officer, assaulting a

noncommissioned officer in the execution of his office, and aggravated assault. In a relatively novel use of the automatism defense, the accused asserted that his fear of confined areas caused him to experience panic attacks while riding in enclosed military vehicles, and that such attacks precipitated his misconduct.⁸¹

Although confirming the convictions, the Army Court of Military Review (ACMR) tacitly recognized the validity of such a defense.⁸² Significantly, the ACMR suggested two factors to examine when evaluating an automatism defense: (1) the motivation behind the accused's behavior and (2) whether the accused was suffering from a condition at the time of the offense that affected his or her ability to reason.⁸³

Amnesia

Amnesia⁸⁴ generally is not considered a defense to charged misconduct,⁸⁵ but is more aptly treated as a symptom of an underlying mental or physical problem.⁸⁶ Amnesia, by itself, does not entitle an accused to the automatism defense.⁸⁷

Although not a defense per se, amnesia is a common and frequently asserted justification for criminal acts. As one court noted, during the last century cases abound with a crimi-

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 6.

⁷⁸ *Id.*

⁷⁹ *Id.* at 5-6.

⁸⁰ No. 9102015, 1993 CMR LEXIS 238 (A.C.M.R. June 30, 1993).

⁸¹ *Id.* at *20 n.4. At trial, the accused presented testimony from three doctors who opined that the accused suffered from claustrophobic panic attacks severe enough to produce "automatic behavior" during the charged incidents. *Id.* at *22; cf. *United States v. Emnett*, 47 C.M.R. 598 (N.C.M. 1973) (accused unsuccessfully attempted to excuse two periods of unauthorized absence by asserting that his absences were the result of claustrophobia; he was unable to tolerate the confines of his ship's engine room).

⁸² *Id.* at *19-24.

⁸³ *Id.* at *20.

⁸⁴ Amnesia is defined as the loss of memory as a result of organic trauma, delirium lesions of the diencephalon area of the brain, hysteria, or epilepsy: BLACK'S LAW DICTIONARY 82 (6th ed. 1990). Three types of amnesia exist: (1) inability to retain new impressions, as in senility; (2) failure to recall prior experiences; and (3) loss of memory for certain periods of life. *Id.*

⁸⁵ *Evans v. State*, 585 A.2d 204, 206 n.3 (Md. 1991); *State v. Jenner*, 451 N.W.2d 710, 721 (S.D. 1990) (citing *State v. Caddell*, 215 S.E.2d 348, 360 (N.C. 1975)); *Commonwealth v. Price*, 218 A.2d 758, 761 (Pa. 1966) ("amnesia actually is no defense at all"), cert. denied, 385 U.S. 869 (1966); *Thomas v. State*, 301 S.W.2d 358, 361 (Tenn. 1957); *United States v. Goggin*, 34 B.R. 399, 401 (1944) ("lack or failure of memory constitutes no defense" to charges of indecent exposure and drunk and disorderly); 40 AM. JUR. 2d *Homicide* § 116 (1968). Additionally, amnesia does not render an accused incompetent to stand trial. *United States ex rel. Parson v. Anderson*, 354 F. Supp. 1060 (D. Del. 1972), cert. denied, 414 U.S. 1072 (1973); *Evans*, 585 A.2d at 206 n.3.

⁸⁶ *United States v. Larkin*, 27 C.M.R. 766, 771 (1959) ("Amnesia is a symptom"); *United States v. Olvera*, 15 C.M.R. 134, 142 (C.M.A. 1954) ("Amnesia is not itself a disease but rather a symptom . . ."); *United States v. Sweet*, 14 B.R. 77, 81 (1942) ("amnesia was not a disease but a symptom, a state of forgetfulness or loss of impairment of memory, which may be caused by a severe physical blow, organic disease, by various toxic agents, or by emotional trauma in a susceptible individual"); *United States v. Harvey*, 1 B.R. (CBI-IBT) 319, 328 (1944) ("amnesia was the result, and not the cause, of [accused's] act"); *Anderson*, 354 F. Supp. at 1071.

⁸⁷ See 1 LAFAYE & SCOTT, SUBSTANTIVE CRIMINAL LAW, § 4.9, at 544 (1986); cf. *United States v. Baran*, 23 M.J. 736, 738 (A.F.C.M.R. 1986) ("proof of amnesia does not conclusively establish that someone was unconscious or lacked mental responsibility at the time of the events they have forgotten").

nal defendant's commonly used excuse that: "I don't remember anything," "My mind went blank," "I blacked out," or "I panicked and I don't remember what I did or anything that happened."⁸⁸

While acknowledging that amnesia may lead to crimes entirely unknown to the accused at a later date, courts have recognized that the bona fide malady is rare, and that more frequently a defendant—remembering well what he or she has done—alleges amnesia as a false defense, hoping that establishing his or her guilt will prove difficult.⁸⁹ The judicial reluctance to accord amnesia per se status as a defense to criminal charges may result from the difficulty of determining whether amnesia was feigned or actually present, and if present, whether it existed during, or subsequent to, the commission of the crime. As one legal commentator has written:

The conditions accompanied by a loss or impairment of memory are many: their borders may be ill-defined or overlap; more than one condition may be operative in a given case; and some carry a more urgent plea for forgiveness than others. In addition, evidence on which to base judgment is insecure because the state of forgetfulness is subjective and easily feigned, and the testimony of witnesses is usually circumstantial.⁹⁰

While amnesia by itself generally is not considered a defense, it can serve as supporting evidence for an automatism

defense.⁹¹ In *United States v. Olvera*,⁹² the accused contested his conviction of aggravated assault stemming from the stabbing of another soldier. The accused testified that he received several blows to the head during the affray and that "thereupon he had lost all recollection temporarily."⁹³

The COMA affirmed the conviction, holding that an accused is not exempted from criminal liability for an assault merely because, during the fight, he received a head injury that produced a retrograde amnesia.⁹⁴ Significantly, however, the COMA recognized that in some cases amnesia may serve an important role as "a symptom confirming other evidence to the effect that the accused did not know the nature and quality of his acts during the period for which he lacked recall."⁹⁵ To be of significance at trial, amnesia "must be linked to other evidence—evidence suggesting, in some measure at least, the existence of a mental state which would serve to negate criminal responsibility."⁹⁶

Not a Complete Defense

Authorities uniformly agree that automatism is not a complete defense; the accused may be held responsible for resulting harm if such harm were foreseeable.⁹⁷ Accordingly, automatism fails as a complete defense when the unconsciousness is produced by voluntary intoxication.⁹⁸ An accused who instigates a fight, during which he receives a blow to the head, cannot rely on automatism to escape all criminal responsibility for subsequent actions.⁹⁹ Further, an accused, who causes a

⁸⁸ *Commonwealth ex rel. Cummins v. Price*, 218 A.2d 758, 760 (Pa. 1966) cert. denied, 385 U.S. 869 (1966); see also *Anderson*, 354 F. Supp. at 1071; *Polston v. State*, 685 P.2d 1, 7 (Wyo. 1984).

⁸⁹ *Thomas v. State*, 301 S.W.2d 358, 361 (Tenn. 1957) (citation omitted). See also *United States v. Diehl*, 33 B.R. 143, 152, 154 (1944) (true amnesia is rare; accused's defense is "not convincing"); *United States v. Clark*, 33 B.R. 229, 233 (1944) ("no credence to accused's testimony with respect to amnesia").

⁹⁰ *Lennox, Amnesia, Real and Feigned*, 10 U. CHI. L. REV. 298 (1943). cf. *United States v. Hayes*, 39 B.R. 261, 270-71 (1944) (amnesia feigned); *Sweet*, 14 B.R., at 82 (testimony concerning "cases where the amnesia is imaginary and there is no way to tell except to examine the patient and try to balance those findings with what can be learned of the previous life of the patient").

⁹¹ Cf. *Sweet*, 14 B.R. at 81-2.

⁹² 15 C.M.R. 134 (C.M.A. 1954).

⁹³ *Id.* at 136. The defense also introduced medical testimony that if the accused had received a blow to the head, it was possible that he was so dazed to be deprived of any conscious intent to commit a particular act and would not know either what he was doing or know the consequences of his actions. *Id.*

⁹⁴ *Id.* at 138. Retrograde amnesia is simply a failure to recall prior experiences. BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

⁹⁵ *Id.* at 138.

⁹⁶ *Id.* at 141.

⁹⁷ PERKINS & BOYCE, *supra* note 12, at 993; LAFAYE & SCOTT, *supra* note 11, at 181; Corrado, *supra* note 11, at 1201 n.36. See also *Greenfield v. Commonwealth*, 204 S.E.2d 414, 417 (Va. 1974) ("self-induced unconsciousness goes only to the grade of the offense and not to the existence of a complete defense").

⁹⁸ PERKINS AND BOYCE, *supra* note 12, at 993 (citing *People v. Cox*, 153 P.2d 362 (Cal. App 2d 1944)); 40 AM. JUR. 2d § 116, at 410-11 (1968) (citations omitted); see also *Polston v. State*, 685 P.2d 1, 9 (Wyo. 1984) ("not a complete defense"); *Fulcher v. State*, 633 P.2d 142, 145 n.5 (Wyo. 1981); *State v. Welsh*, 508 P.2d 1041, 1044 (Wash. Ct. App. 1973) (voluntarily induced state of unconsciousness does not attain the stature of a complete defense).

⁹⁹ PERKINS & BOYCE, *supra* note 12, at 993-94 (citing *Watkins v. People*, 408 P.2d 425 (Colo. 1965)); *United States v. Olvera*, 15 C.M.R. 134, 139 (C.M.A. 1954) (to merit acquittal, amnesia attributable to head injuries must be received without fault on the accused's part); *Fulcher*, 633 P.2d at 145 n.5.

fatal automobile accident during a "blackout," cannot escape a conviction for manslaughter when he was driving with full knowledge that he was subject to frequent blackouts.¹⁰⁰

Foreseeable or self-induced incapacitation, however, can serve as a *partial* defense to criminal charges. When unconsciousness results from voluntary intoxication, the automatism defense may be unavailable, but the accused still retains the defense of intoxication, permitting a finding of guilt for other or lesser included offenses.¹⁰¹ In the military, voluntary intoxication may create a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness or premeditation.¹⁰²

Application of the Defense in the Military

A military judge must give an instruction on any defense reasonably raised.¹⁰³ A defense is reasonably raised when either the defense, the prosecution, or the court has presented some evidence addressing the issue.¹⁰⁴ Further, the court has a *sua sponte* duty to instruct the members when a "special defense" is raised by the evidence.¹⁰⁵

Whether automatism would fall under one of the special defenses is unclear,¹⁰⁶ and if so, where it would fit likewise is unclear.¹⁰⁷ A special defense is a defense "which, although not denying that the accused committed the objective *acts* constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts."¹⁰⁸ The COMA appeared to view the automatism defense as going to the issue of *actus reus*.¹⁰⁹ If no *actus reus* is present, technically speaking, no "act" giving rise to criminal liability exists.¹¹⁰

Assuming *arguendo*, that automatism falls in one of the special defenses, the military justice system must determine which special defense applies. Because an accused suffering from automatism normally does not suffer from a *severe* disease or defect,¹¹¹ and the weight of precedent distinguishes between the insanity and automatism defenses,¹¹² the lack of mental responsibility special defense would not apply. Further, because the automatism defense is not limited to contesting special states of mind that are elements of an offense, but rather negates *all* intent,¹¹³ the partial mental responsibility defense also appears to be inapplicable.

¹⁰⁰PERKINS & BOYCE, *supra* note 12, at 994 (citing *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962)); *see also* *Government of the Virgin Islands v. Smith*, 278 F.2d 169, 175 (3d Cir. 1960) (may be found guilty of criminal negligence); *Fulcher*, 633 P.2d at 145 n.5; *Smith v. Commonwealth*, 268 S.W.2d 937, 938 (Ky. Ct. App. 1954); *State v. Gooze*, 81 A.2d 811 (N.J. Super. 1951).

¹⁰¹*Polston*, 685 P.2d at 9 (citing *People v. Baker*, 268 P.2d 705 (Cal. 2d 1954)); *United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992) ("Voluntary intoxication may be a defense to a specific intent crime").

¹⁰²MANUAL FOR COURTS-MARTIAL, *United States*, R.C.M. 916(1)(2) (1984) [hereinafter MCM]; *see generally*, Milhizer, *Voluntary Intoxication As A Criminal Defense Under Military Law*, 127 MIL. L. REV. 131 (1990). While voluntary intoxication may serve as a defense to a charge containing as an element either actual knowledge, specific intent, willfulness, or premeditation, it will fail as a defense where such special elements are absent. *Id.* at 156.

¹⁰³*Warren & Jewell, Instructions And Advocacy*, 126 MIL. L. REV. 147, 167 (1989) (citations omitted).

¹⁰⁴*Id.* at 168, n.97 (citing *United States v. Tan*, 43 C.M.R. 636 (A.C.M.R. 1971) and R.C.M. 916(b)); *see also* *United States v. Van Syoc*, 36 M.J. 461, 464 (C.M.A. 1993) (must instruct whenever "some evidence" is presented; such evidence need not be compelling or convincing beyond a reasonable doubt). When, however, the defense contains several elements of proof, the record must contain some evidence as to each element before the judge has a duty to instruct on it. *United States v. Ferguson*, 15 M.J. 12, 17 (C.M.A. 1983).

¹⁰⁵*Warren & Jewell, supra* note 103, at 168. Special defenses also are referred to as affirmative defenses. *Id.* (citing R.C.M. 916(a)).

¹⁰⁶Automatism could be recognized explicitly as a separate special defense by adding it to the *Manual For Courts-Martial* or by judicial decision. Milhizer, *Necessity And The Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95, 118-9 (1988).

¹⁰⁷The special defenses include (1) justification, (2) obedience to orders, (3) self-defense, (4) defense of other, (5) accident, (6) entrapment, (7) coercion or duress, (8) inability, (9) ignorance or mistake of fact, (10) lack of mental responsibility, (11) partial mental responsibility, and (12) voluntary intoxication. MCM, *supra* note 102, R.C.M. 916; *Warren & Jewell, supra* note 103, at 168-70. In *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988), the COMA invalidated R.C.M. 916(k)(2) and resurrected the partial mental responsibility defense for the purpose of negating the special state of mind elements of a charged offense; *see also* *Warren & Jewell, supra* note 103, n.112; *United States v. Tarver*, 29 M.J. 605, 608 (A.C.M.R. 1989).

¹⁰⁸MCM, *supra* note 102, R.C.M. 916(a) (emphasis added).

¹⁰⁹*United States v. Berri*, 33 M.J. 337, 341 n.9 (C.M.A. 1991).

¹¹⁰*See supra* notes 15-18 and accompanying text; *see also* *State v. Jerrett*, 307 S.E.2d 339, 353 (N.C. 1983) ("excludes the possibility of a voluntary act without which there can be no criminal liability").

¹¹¹Brain tumors, severe brain concussions, and some forms of epilepsy may satisfy this requirement, and properly should be pleaded as an insanity defense; *see supra* note 25, (citing *Glueck, supra* note 9, at 56-7 n.32; *Slodov, supra* note 25, at 283).

¹¹²*See* UC MJ art. 50a (1988) (severe mental disease or defect); MCM, *supra* note 102, R.C.M. 916(K)(1) (severe mental disease or defect); *supra* text accompanying Application of the Defense Generally.

¹¹³*See supra* note 33 and accompanying text; 40 AM. JUR. 2d *Homicide* § 116 (1968) (no criminal intent).

At least facially, the accident special defense appears to encompass the automatism defense. The defense of accident is applicable when "death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable."¹¹⁴

For a successful accident defense, the accused must satisfy three elements: (1) the accused was engaged in an act not prohibited by law, regulation, or order; (2) the act was performed in a lawful manner—that is, with due care and without simple negligence; and (3) the act was done without any unlawful intent.¹¹⁵ Automaton behavior satisfies the second and third prongs. The automatism defense also requires that the act be unforeseeable or free of criminal negligence. Further, an automaton is, by definition, devoid of criminal intent.

The first prong presents the greatest obstacle to accepting automatism as a subset of the accident defense. A soldier who suffers an unforeseeable blackout or seizure while driving an automobile and then kills a pedestrian while unconscious, is engaged in an act—driving—that otherwise is lawful. If,

however, a sleepwalker were to kill someone with a pistol, the act of shooting the victim could not be characterized as lawful.¹¹⁶ Arguing that the act was "lawful" because it was accomplished without criminal intent merely brings you back to square one—that is, no criminal act exists at all. Accordingly, while automatism and accident may overlap as defenses under the proper facts, they do not form a perfect match.

Conclusion

Automatism is clearly a recognized, albeit ill-defined, defense to charged misconduct in the military justice system. Based on the scant guidance that the COMA has provided, the defense does not appear to be a special defense. Instead, automatism challenges *actus reus*, which is a necessary prerequisite to criminal liability. Without *actus reus*, no criminal act exists on which to base a criminal conviction. Accordingly, automatism serves as a complete defense to any charged offense.

¹¹⁴MCM, *supra* note 102, R.C.M. 916(f). Similar to an automatism defense, the defendant's conduct is not excused if such conduct was foreseeable or negligent. *Id.*; see also *United States v. Rodriguez*, 31 M.J. 150, 157 (C.M.A. 1990) (defense not available when the act which caused the injury was a negligent act); *United States v. Leach*, 22 M.J. 738, 739 (N.M.C.M.R. 1986) (culpable negligence); *United States v. Redding*, 34 C.M.R. 22, 26 (C.M.A. 1963) ("Accident" . . . excludes negligence and wrongdoing"); cf. *supra* text accompanying "Application of the Defense in the Military."

¹¹⁵*United States v. Van Syoc*, 36 M.J. 461, 464 (C.M.A. 1993); *United States v. Ferguson*, 15 M.J. 12, 17 (C.M.A. 1983) (citations omitted).

¹¹⁶In *United States v. Sandoval*, 15 C.M.R. 61 (C.M.A. 1954), the accused was convicted of unpremeditated murder after shooting a fellow soldier in the house of a Korean prostitute. The accused appealed his conviction, arguing that the weapon accidentally discharged when the weapon struck against the door post and, accordingly, the law officer erroneously had failed to instruct the members on the defense of accident. *Id.* at 63, 67. The court affirmed the conviction holding, in part, that because the accused possessed the weapon without authorization and in direct disobedience of orders, he was not performing a lawful act in a lawful manner. *Id.* at 67; cf. *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963) (accused who shot fellow sentry while practicing his "fast-draw" not entitled to accident instruction, in part, because such conduct violated sentry standing operating procedure). But cf. *United States v. Small*, 45 C.M.R. 700, (A.C.M.R. 1971) (even if accused was carrying pistol in violation of United States Army Europe regulations, he still was entitled to accident instruction for shooting victim as long as violation of the regulation was not the proximate cause of the homicide).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

The ACMR Clarifies Bertelson Inquiry Requirements in Mixed-Plea Courts-Martial

Before a stipulation of fact—which contains sufficient evidence to prove a prima facie case for an offense to which the

accused pleaded not guilty—may be used as evidence to prove that offense, the military judge must perform an inquiry to ensure "that the accused has first knowingly, intelligently and voluntarily consented to [the stipulation's] admission."¹ In *United States v. Banks*² and *United States v. Abdullah*,³ both mixed-plea cases, the Army Court of Military Review (ACMR) recently found the providence inquiries of the appellants insufficient to use the respective stipulations of fact as proof on contested charges.

¹*United States v. Bertelson*, 3 M.J. 314, 315 (C.M.A. 1977).

²36 M.J. 1003 (A.C.M.R. 1993).

³37 M.J. 692 (A.C.M.R. 1993).

In *Banks* and *Abdullah*, the ACMR dismissed contested charges because a *Bertelson* inquiry—specifically applicable to these charges—was not performed by the military judge, even though, in each case, the facts in the stipulation were used as evidence on contested charges. In *Banks*, the ACMR relied on the inherent inconsistency between a not-guilty plea and an admission of guilt in a stipulation of fact.⁴ In *Abdullah*, the ACMR based its ruling on both the lack of a *Bertelson* inquiry⁵ and the use of admissions in the providence inquiry as evidence on a separate contested charge.⁶ The *Abdullah* decision states that such “admissions implicit in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense.”⁷

In *Bertelson*, the United States Court of Military Appeals (COMA) explained:

the issue here is not so much whether the accused desired the admission of the stipulation as it is whether he knew it was inadmissible as evidence unless he preferred to have it admitted . . . we believe the military judge was required to expressly communicate to the appellant before accepting his confessional stipulation that under the Manual it could not be accepted without his consent.⁸

Therefore, in *Banks*, the ACMR ruled that the military judge’s prior inquiry of the appellant, on the stipulation of fact’s use to charges to which he pleaded guilty, was insufficient to allow its use to prove contested charges. The ACMR ruled that a *Bertelson* inquiry—specifically applicable to the contested charges—also was required. The ACMR held:

Under the circumstances of this case, we find that the stipulation of fact entered into by the appellant amounted to a confession and could not be considered by the military judge as to those charges to which the appellant pled not guilty without the military judge *again* conducting the required

Bertelson inquiry and obtaining the appellant’s consent to do so in accordance with R.C.M. 811(c).⁹

In *Banks*, the ACMR based its ruling in part on the absence of any agreement by the appellant in his pretrial agreement for the stipulation of fact to be used to prove the offenses to which he pleaded not guilty.¹⁰ The ACMR also relied on the military judge’s guidance found in the *Military Judges’ Benchbook* (*Benchbook*).¹¹ The ACMR in *Banks* found:

In this case, the stipulation of fact was specifically admitted into evidence for the limited purpose of facilitating the providence inquiry as to those charges to which the appellant pled guilty. If the appellant’s plea of guilty had not been accepted by the military judge, the stipulation would have been “null and void.” Furthermore, the military judge’s own advice to the appellant limited the use of the stipulation so that “if [he admitted] the stipulation into evidence it [would] be used in two ways. First, . . . to assist in determining if [the appellant was], in fact, guilty, and, second, . . . in selecting an appropriate sentence We find nothing in the record of trial to indicate that the military judge discussed any further uses of the stipulation with the appellant.”¹²

In *Abdullah*, the ACMR also relied on the language of the pretrial agreement in finding that the stipulation of fact should not have been used to prove a contested charge. The ACMR held:

In the absence of the detailed discussion mandated by *Bertelson*, the stipulation should not have been considered by the military judge in determining facts for the contested aggravated arson charge.

Even if the stipulation was not confessional, our conclusion remains the same.

⁴ *Banks*, 36 M.J. at 1006; see also *United States v. Wilson*, 20 U.S.C.M.A. 71, 74, 42 C.M.R. 263, 266 (1970).

⁵ *Abdullah*, 37 M.J. at *694.

⁶ *Id.*

⁷ *Id.* at *693 (quoting *United States v. Caszatt*, 29 C.M.R. 521, 522 (C.M.A. 1960)).

⁸ *United States v. Bertelson*, 3 M.J. 314, 316 (C.M.A. 1977).

⁹ *United States v. Banks*, 36 M.J. 1003, 1006 (A.C.M.R. 1993) (emphasis added).

¹⁰ *Id.* at 1005.

¹¹ DEP’T OF ARMY, PAMPHLET 27-9, *MILITARY JUDGES’ BENCHBOOK*, para. 2-11 (1 May 1982) [hereinafter *BENCHBOOK*].

¹² *Banks*, 36 M.J. at 1006.

The pretrial agreement in this case specifically stated that the stipulation of fact was entered into to describe those offenses to which the appellant pled guilty. Thus, by implication, that stipulation does not describe the facts pertinent to the offenses for which a not guilty plea was entered. In the absence of an explicit agreement between the appellant and the convening authority stipulating the facts of the case without regard to the offenses to which they may be applied, we are reluctant to expand the plain terms of the pretrial agreement.¹³

Because the required inquiries to the contested charges were not performed in *Banks* or *Abdullah*, the ACMR disregarded the stipulations of fact in determining if the evidence was sufficient to prove the contested charges. In each case, the ACMR dismissed the contested charges because it found the remaining properly admitted evidence insufficient.

The military judges in *Banks* and *Abdullah* followed the *Benchbook* in their advice to the accuseds during these mixed-plea courts-martial. Therefore, the *Bertelson*-inquiry error in these cases has a strong probability of being repeated in the future. Defense counsel should move for a finding of not guilty in any mixed-plea court-martial when the government relies on a stipulation of fact that "constitutes a de facto plea of guilty"¹⁴ to prove a contested charge if a *Bertelson* inquiry, specifically tailored to that charge, is not performed. Captain Lewis.

Do Military Judges Pass Constitutional Muster?

Military judges are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution.¹⁵ These "Officers of the United States," however, have not been properly appointed to their office by the President, "with the Advice and Consent of the Senate."¹⁶

Therefore, military judges do not have constitutionally valid jurisdiction to hear cases.

Navy-Marine Corps Defense Appellate Counsel raised this argument before the United States Supreme Court in *Weiss v. United States*.¹⁷ If the Court finds the argument to be valid, all courts-martial convictions could be overturned and the military justice system considerably changed.

The petitioners in *Weiss* ask the Supreme Court to determine the scope of the Appointments Clause of the United States Constitution and raise two issues:¹⁸

(1) May The Judge Advocate General of an Armed Force appoint commissioned officers to serve as trial and military appellate judges on the theory that their appointment by the President of the United States as commissioned officers satisfies the Appointments Clause of the Constitution for both their judicial and nonjudicial duties?¹⁹ and,

(2) Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their offices for fixed terms?²⁰

Resolving these issues in favor of the petitioners could have a tremendous impact. Counsel are advised to view the developments of the *Weiss* case closely.

The Appointments Clause Issue

The first issue in *Weiss* concerns the applicability of the Appointments Clause to the military justice system. The Appointments Clause provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and

¹³ *United States v. Abdullah*, 37 M.J. 692, *694 (A.C.M.R. 1993).

¹⁴ *United States v. Bertelson*, 3 M.J. 314, 315 n.2 (C.M.A. 1977).

¹⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁶ *Id.*

¹⁷ 36 M.J. 224 (C.M.A. 1992), *petition for cert. granted*, 61 U.S.L.W. 3783 (U.S. May 24, 1993) (No. 92-1482).

¹⁸ The same issues are being raised in additional petitions before the Court, which join over 300 trailer cases to *Weiss*: *Barkley v. United States*, No. 93-0081/AR (C.M.A. Jan. 14, 1993), *petition for cert. filed*, 61 U.S.L.W. 3732 (U.S. Apr. 12, 1993) (No. 92-1646); *Curtis v. United States*, No. 91-1482 (C.M.A. Apr. 8, 1993), *petition for cert. filed*, 61 U.S.L.W. 3820 (U.S. May 24, 1993) (No. 92-1861); *Doucette v. United States*, No. 93-0242/AR (C.M.A. Apr. 14, 1993), *petition for cert. filed*, (U.S. July 13, 1993) (No. 93-68).

¹⁹ The *Weiss* petition does not question the validity of judges at the Court of Military Appeals level. Those judges are appointed by the President and approved by the Senate. Because their appointment complies with the Appointments Clause of the Constitution, they have proper jurisdiction to hear cases.

²⁰ The Court of Military Appeals rejected this issue in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *petition for cert. filed*, 61 U.S.L.W. 3500 (U.S. Dec. 29, 1992) (No. 92-1102).

Consuls, Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²¹

This clause promotes a separation of powers by diffusing the power to appoint. It prevents one government branch from aggrandizing its power over others.²² Congress may create an office, but the President, the courts of law, or the heads of departments are to fill that office. No one branch can create and fill positions by itself.

Military judges are appointed by The Judge Advocate General of each Armed Force.²³ Military judges must be commissioned officers who are members of the Federal Bar or the highest bar of a State and who are certified to be qualified for duty by The Judge Advocate General of his or her branch.²⁴

The petitioners in *Weiss* contend that the system of appointing military judges is constitutionally inadequate. Military judges are officers of the United States because they exercise significant authority pursuant to the laws of the United States.²⁵ Therefore, the President of the United States, not the service Judge Advocates General, should appoint them.

Additionally, judges appointed by The Judge Advocate General may feel obliged to that appointing officer. Judge Advocates General supervise all military lawyers who practice at courts-martials, including prosecutors. The Judge Advocate General of the Navy-Marine Corps writes the fitness reports of the members of the Navy-Marine Court of Military Review.²⁶ These reports determine promotions, duty assignments, and career paths.²⁷ Such supervision impairs the ability of military judges to render impartial decisions, because they are mindful of the control exercised over them by Judge Advocates General. Adhering to the Appointments Clause

would help avoid this problem. Military judges appointed by the President could be removed only by the President. Although The Judge Advocate General of each service would continue to supervise and rate military judges, their appointment and removal would be at the President's discretion. This procedure would permit military judges to make decisions without fear of being removed from office for an unpopular judgment.

The Fifth Amendment Due Process Issue

The petitioners in *Weiss* raise this second issue in summary fashion because it previously was raised before the Supreme Court in the *Graf* petition. Because *Graf* and *Weiss* raise related jurisdictional issues, the Court can now consider them together.

The Fifth Amendment of the Constitution provides, "No person shall be . . . deprived of life, liberty, or property without due process of law."²⁸ The amendment seeks to protect citizens from the government taking actions without allowing the opportunity to be heard, or acting without ordered regular procedures. Due Process seeks to establish "a limit on arbitrary and unreasonable actions by the federal government."²⁹

The petitioners asserted that the appointment of military judges is neither ordered nor regularized. Military judges are not appointed for fixed terms, but are certified, appointed, and removed at the discretion of The Judge Advocate General. Failure to provide fixed terms for military judges prevents impartial decision making. Military judges do not enjoy the security and independence of a fixed term of office. This creates a feeling of dependence on the discretion of The Judge Advocate General, which may prevent decisions that are perceived as being unpopular. When military judges enjoy fixed terms of office, they can make decisions freely without fear of being removed should their decisions displease their superior.

Disposition of Weiss By The Court of Military Appeals

The COMA did not address *Weiss*' Due Process claim because it recently had rejected the issue in *Graf*. In *United*

²¹ U.S. CONST. art. II, § 2, cl. 2.

²² See *Freytag v. Internal Revenue Commissioner*, 111 S. Ct. 2631, 2638 (1991).

²³ UCMJ art. 6 (1988).

²⁴ UCMJ art. 26 (1988).

²⁵ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁶ See *United States v. Mitchell*, No. 92-1933 (N.M.C.M.R. May 24, 1993), *petition granted*, No. 93-1044 (C.M.A. July 13, 1993).

²⁷ The United States Army Chief Judge (CJ) is rated by The Assistant Judge Advocate General (TAJAG) and senior-rated by The Judge Advocate General (TJAG). Other appellate judges are both rated and senior-rated by TAJAG. The Chief Trial Judge is rated by the CJ and senior-rated by the TAJAG. All other trial judges are rated by either the Circuit Judge, the Chief Trial Judge, or the Chief Appellate Judge (whichever is their senior in rank) and are senior-rated by the CJ. Information was provided by the Administrative Office, USALSA, and represents the status of the Army Judiciary as of 20 July 1993.

²⁸ U.S. CONST. amend. V.

²⁹ RALPH C. CHANDLER, ET AL., CONSTITUTIONAL LAW DESKBOOK § 8.38 (1987).

States v. Weiss, however, the judges split 2-1-1-1 when addressing the Appointments Clause issue.

Judge Gierke wrote the lead opinion and Judge Cox concurred. They held that the Appointments Clause applies to the military justice system. Because military judges are commissioned officers, they already have been appointed by the President and approved by the Senate. Applying *Shoemaker v. United States*,³⁰ Judge Gierke found that a military officer may be given new duties without a second appointment by the President, if those duties are germane to the officer's existing duty. He found a military judge's duties germane to a military officer's duties. Consequently, a second Article II appointment was not necessary.

Judge Crawford concurred only in the result of the lead opinion. Engaging in a historical constitutional analysis, she found that the Appointments Clause does not apply to the military justice system, because the military judiciary did not exist when the Clause was adopted. A contemporary analysis of the Constitution led Judge Crawford to conclude that the method of appointing military judges does not violate the purpose of the Appointments Clause. Additionally, she noted that Congress should be given great deference in military matters.

Chief Judge Sullivan and Judge Wiss wrote separate dissenting opinions. Judge Sullivan asserted that military judges are "inferior Officers" who must be appointed according to the Appointments Clause. He noted that even though Congress has broad power to regulate the military, it is not excused from constitutional requirements. The Chief Judge noted that the *Shoemaker* exception to the Appointments Clause is very narrow and found that the duties of a military judge are not germane to the duties of an officer.

Judge Wiss also maintained the office of military judge as distinct from a general military officer and must be filled as directed by the Appointments Clause. He also rejected the *Shoemaker* analysis and found that the lead opinion read the case too broadly. Judge Wiss found that the duties of a military judge are not germane to those of an officer and that an officer's prior appointment does not satisfy the Appointments Clause when he or she becomes a military judge.

The COMA's rejection of *Weiss*'s Appointments Clause claim was not based on majority agreement, but the divergent views of three of its members. Four of the five judges found the Appointments Clause applicable to the appointment of military judges. Of those four judges, two felt that appointment as a military officer satisfied the Constitution and two did not. Their divergent opinions indicate a need for a clear definition of how the Appointments Clause applies to the military justice system.

Suggestions for Practitioners

The military justice system could change dramatically if the Supreme Court finds that military judges are appointed in violation of the United States Constitution. To preserve the issue in every case, defense counsel always should question military judges through *voir dire* and challenge them for cause.

Rule for Courts-Martial 902(d)(2),³¹ permits each party in a proceeding to question the military judge on possible grounds for disqualification. Because the jurisdiction of military judges could be found as constitutionally suspect, defense counsel should question the judge's status and appointment.

Defense counsel should ask the following questions:

—How long has the military judge served in that capacity, and by whom was the judge appointed?

—When is the judge's next Officer Evaluation Report (OER) due and who is the rater and senior rater?

—Does the judge feel that his or her decisions affect OER ratings or future job assignments?

—Has the judge ever been questioned by his or her superiors for the judgments he or she has made?

—Have the judge's decisions ever been reviewed, corrected, or criticized by a superior?

Even though these questions likely are to be answered in the negative, raising them preserves the issue.

Following *voir dire*, defense counsel should challenge the military judge for cause—citing *Weiss*—and raise the Appointments Clause and Due Process issues—citing *Freytag* and *Buckley*. This will preserve the matter on the record and may benefit your client should the Supreme Court render a favorable decision in *Weiss*.

Conclusion

The *Weiss* decision could radically change the current system by which military judges are appointed. Counsel can and should raise this issue each time they represent a client, preserving the matter on the record. The Supreme Court is expected to hear the case during its upcoming 1993 Fall Term. Miriam Chapman, Summer Intern.

³⁰ 147 U.S. 282 (1893). In *Shoemaker*, the United States Supreme Court found that officers of the United States were required to be appointed by the President and confirmed by the Senate. In that case, the Chief Engineer of the United States Army and the Engineer Commissioner for the District of Columbia—who were military officers appointed according to the Appointments Clause—were appointed to a commission to select and survey land for a park. The Court held that a second Article II appointment was not necessary because the new engineering duties were germane to their previous duties. *Shoemaker* can be distinguished from military lawyers—who represent clients—and military judges—who decide cases—because the duties of one office are not germane to the duties of the other.

³¹ MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 902 (d)(2) (1984).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Trial Judges Have Wide Latitude in Granting or Denying Causal Challenges

A "Mandate" to Liberally Grant Causal Challenges

The "mandate"¹ to grant causal challenges liberally is the product of a divergence of case law and statute. The 1969 *Manual for Courts-Martial (1969 Manual)* stated that military judges "should be liberal in passing on challenges."² In 1983, the United States Court of Military Appeals (COMA) in *United States v. Mason*,³ affirmed a military judge's denial of a causal challenge when the challenged member had a prior relationship with the government's chief witness.⁴ The dissent in *Mason*, however, contended that, from the viewpoint of the member, the government witness would "begin . . . with a presumption of credibility" not shared by any defense witness. The dissent contended that this situation was unfair and contrary to the 1969 *Manual's* "direction" to liberally grant causal challenges.⁵

The 1984 *Manual for Courts-Martial (1984 Manual)* dropped the "liberal grant" language, but its absence was "not intended to change the policy expressed in [the earlier] statement."⁶ The analysis in the 1984 *Manual* goes on to say that the 1969 statement was merely "precatory."⁷

After these changes in the 1984 *Manual* occurred, the COMA decided *United States v. Smart*.⁸ In *Smart*, the COMA set aside the sentence in an armed robbery case because the military judge had not granted challenges for cause against two members who had been the victims of similar crimes.⁹ The COMA relied on the *Mason* dissent, which in turn relied on the 1969 *Manual*, to support the concept that "[t]he proper course of action is to give heed to the *mandate* for liberality in passing on challenges."¹⁰

Based on the language in *Smart*, what the 1984 *Manual* called "precatory language" became a "mandate".¹¹

A Deferential Standard of Review

The "liberal grant" mandate is counterbalanced by a highly deferential standard of review. In the recent case of *United States v. White*,¹² the COMA explained:

A trial court's standard is to grant challenges for cause liberally. An appellate court's standard is to overturn a military judge's ruling on a challenge only for a clear abuse of discretion. This means that military judges must follow the liberal grant mandate in ruling on challenges for cause, but we will not overturn the military judge's determination not to grant a challenge except for a clear abuse of discretion in applying the liberal grant mandate.¹³

¹United States v. Smart, 21 M.J. 15, 21 (C.M.A. 1985).

²MANUAL FOR COURTS-MARTIAL, United States, ¶ 62h(2) (rev. ed. 1969) [hereinafter 1969 MANUAL].

³16 M.J. 455 (C.M.A. 1983).

⁴*Id.* at 457, 458. Unfortunately, the exact nature of the relationship between the member and the witness in *Mason* is unclear. The majority opinion refers to it only as an "association." *Id.* at 457. The dissent is hardly more specific in calling it "an extensive prior relationship." *Id.* at 458. The member was a colonel and the witness was a sergeant. *Id.* at 456 n.3.

⁵*Id.* at 458-59 (Everett, C.J., dissenting).

⁶MANUAL FOR COURTS-MARTIAL, United States, A21-54 (1984) [hereinafter MCM].

⁷*Id.*

⁸21 M.J. 15 (C.M.A. 1985).

⁹*Id.* at 20, 21.

¹⁰*Id.* at 21 (emphasis added).

¹¹"Precatory" has been defined to mean "[h]aving the nature of prayer, request, or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." BLACK'S LAW DICTIONARY 1176 (6th ed. 1991). A mandate is a "command, order, or direction, written or oral, which a court is authorized to give and a person is bound to obey . . ." *Id.* at 962.

¹²36 M.J. 284 (C.M.A. 1993).

¹³*Id.* at 287.

Clear abuse of discretion is a much older standard than the liberal granting of challenges. It first appeared in a 1954 COMA decision, *United States v. Deain*, which stated, "There must be a clear abuse of discretion in resolving the conflict before an appellate tribunal, which lacks authority to reweigh the facts, will reverse a decision."¹⁴

Deference to the factfinder is firmly established. Even *Smart*—which introduced the liberal grant mandate—said that appellate authorities should "give great weight to the evaluation . . . by the military judge, who observed the member's demeanor during *voir dire*."¹⁵ The *White* decision also emphasizes the degree of deference permitted the trial judge:

"Great deference" is not a separate standard but, rather, is the reason for the standard. We give a military judge great deference because we recognize that he [or she] has observed the demeanor of the participants in the *voir dire* and challenge process. Because we give the military judge great deference, we will overturn his [or her] ruling on a challenge only if we find a clear abuse of discretion.¹⁶

Using, or appearing to use, this standard of review in recent cases, the COMA has affirmed trial judges' denials of causal challenges against the following court-martial members:

—A member who was the rater of another member, in *White*.¹⁷

—A member who had "intimate knowledge" of how recruiters work, in *White* (a case involving fraudulent enlistment). Defense counsel was concerned that the member's expertise would give him undue influence over the other members.¹⁸

—A member who knew a witness and had lunch with him on the day of the *voir dire*, in *White*.¹⁹

—A member who came to believe that the defendant was guilty as a result of media coverage in *United States v. Coppock* (member for sentencing only).²⁰

—A member who was a "close friend" of the accuser and who was the rater of another member, in *United States v. Bannwarth*.²¹

—A member who was the father of a child victim of a homosexual assault, in *United States v. Brown* (a case involving consensual homosexual conduct between adults).²²

—Members of an entire panel that had dinner with the government's expert witness on the first day of the trial, and three who had breakfast with him the next morning, in *United States v. Elmore*.²³

Cases exist in which the COMA will find that a clear abuse of authority has occurred. In *United States v. Berry*,²⁴ the COMA found that a trial judge erred in denying a defense challenge for cause in light of the following:

First [the] court-martial member was a former . . . undercover agent who had been recently deployed to combat drug use, one of the crimes charged against appellant. Second, this member was presently assigned . . . where appellant's alleged larcenies took place. Third, [this member] knew and on occasion worked with . . . a critical witness against appellant and [the witness was] a person with whom [this member] would work in the future. *These circumstances, while not individually disqualifying in themselves, together raised a substantial question as to the impartiality of [this member].*²⁵

¹⁴ *United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) (citations omitted).

¹⁵ *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985).

¹⁶ *White*, 36 M.J. at 287.

¹⁷ *Id.*

¹⁸ *Id.* at 289.

¹⁹ *Id.* at 286.

²⁰ 37 M.J. 145, 148, 150 (C.M.A. 1993).

²¹ 36 M.J. 265, 266 (C.M.A. 1993).

²² 34 M.J. 105 (C.M.A. 1992).

²³ 33 M.J. 387, 392, 393 (C.M.A. 1991).

²⁴ 34 M.J. 83 (C.M.A. 1992).

²⁵ *Id.* at 87 (emphasis added) (citations omitted).

Similarly, in *United States v. Abdelkader*,²⁶ the Air Force Court of Military Review held that a trial judge erred in denying a defense challenge for cause when the challenged member reviewed performance reports for seven other members and may have had access to extensive information about the case before trial.²⁷ More recently, in *United States v. Perez*,²⁸ the Navy-Marine Corps Court of Military Review (NMCMR) cited *White* in finding abuse of discretion when a trial judge denied challenges of members who were eyewitnesses to all or part of the events giving rise to the criminal charges.

Conclusion

Trial judges operate under a mandate from the COMA to grant challenges for cause liberally. The COMA, however, enforces this mandate only in cases of clear abuse of authority by a trial judge. Practitioners have a powerful incentive to state the reasons for a causal challenge as clearly and as strongly as possible. They also should provide multiple reasons whenever the facts allow. If a challenge is denied, such statements will give the appellate authorities greater opportunity to find abuse of discretion by the trial judge. Mr. Baker, Summer Intern.

Courts of Review Split on "Self-Help" Defense

The seldom used defense of "self-help" recently was the subject of two cases before the Army Court of Military Review (ACMR) and the NMCMR.²⁹ In arriving at their respective decisions, the courts reached different conclusions as to the continued validity of this defense, which also is known as "the claim of right" defense. Before discussing these two decisions, a brief understanding of the defense is necessary.

The "Self-Help" Defense

The self-help defense usually arises when a creditor seizes some item of property belonging to the debtor in an effort to force the debtor to make good on the debt. Seizure under these circumstances is accomplished without legal proceedings. An example of self-help is when an innkeeper seizes the property of a tenant until the tenant pays the innkeeper all monies owed.³⁰

Several conflicting views exist on the self-help or claim of right defense. Under the *Model Penal Code* view, the defense is available in three situations including when the defendant honestly believed "that he [or she] had a right to acquire or dispose of it as he [or she] did."³¹ Most jurisdictions have adopted one or all of the *Model Penal Code* formulations for the claim of right defense.³²

"Some jurisdictions provide a claim of right defense similar to the Model Penal Code defense . . . but require [only] a reasonable belief in a right, license or privilege to do so."³³ "Other jurisdictions have completely rejected any broad claim of right defense," choosing instead to place greater restrictions on such claims.³⁴

Military courts long have recognized the claim of right or self-help defense.³⁵ In *United States v. Smith*, the COMA stated "[i]f the accused rightfully took certain items of [property] as collateral for the debt owed him by [the owner], then he was guilty neither of wrongful appropriation nor of any lesser included offense of larceny."³⁶

Military courts also recognize several important limitations on the defense. First, the value of the property taken must reasonably approximate the value of the debt owed. It would

²⁶ 34 M.J. 605 (A.F.C.M.R. 1992).

²⁷ *Id.* at 605, 607.

²⁸ 36 M.J. 1198 (N.M.C.M.R. 1993).

²⁹ *United States v. Gunter*, 37 M.J. 781 (A.C.M.R. 1993); *United States v. Martin*, 37 M.J. 546 (N.M.C.M.R. 1993).

³⁰ *Martin*, 37 M.J. at 548.

³¹ MODEL PENAL CODE § 223.1 (1980) provides the following:

Claim of Right. It is an affirmative defense to prosecution for theft that the actor:

- (a) was unaware that the property or service was that of another; or
- (b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or
- (c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

³² *Id.* cmt. 4.

³³ 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 109(b) (1984).

³⁴ *Id.*

³⁵ See *United States v. Smith*, 8 C.M.R. 112 (C.M.A. 1953).

³⁶ *Id.* at 113-14.

be improper for a creditor to seize a debtor's \$800 stereo as collateral for a \$100 debt.³⁷ Second, no retrieval right to contraband exists. Therefore, the defense is not available to an accused who takes the victim's property as payment or collateral for a debt incurred as the result of a drug transaction.³⁸ Finally, while the defense may exist to negate the larceny aspect of an offense, it will not shield an accused from other potential offenses when the debtor's property is seized in a violent manner. Accordingly, one who confronts the victim with a weapon to seize property may have a valid self-help defense—and be innocent of robbery—but, nevertheless, be found guilty of an aggravated assault.³⁹

The Cases of United States v. Martin and United States v. Gunter

In *United States v. Martin*, the accused pleaded guilty to wrongful appropriation of a ring valued at approximately \$100 to \$150. During the providence inquiry, he advised the military judge that the victim owed him a debt of approximately \$220. He said that he beat the victim and took the victim's ring solely to secure payment of the debt after the victim previously had dismissed his collection efforts. On appeal, Martin argued that his comments established a valid self-help defense that was inconsistent with his plea.⁴⁰

In rejecting the accused's argument, the majority of the court stated "the innocent purpose" doctrine was abandoned in *United States v. Kastner*, and *United States v. Johnson*.⁴¹ According to the majority, rejection of the innocent purpose doctrine effectively negated the line of cases from the COMA recognizing the self-help defense.⁴²

In his concurrence, Judge Mollison also rejected the accused's argument. Judge Mollison recognized the possible validity of the self-help defense, but rejected its applicability under these facts because the accused employed force and violence in making the property seizure.⁴³

In *United States v. Gunter*,⁴⁴ the accused pleaded guilty to wrongful appropriation. During his providence inquiry he

made several comments indicating that the property was taken to satisfy debts owed to him. In this case, however, the alert military judge advised the accused of the possible applicability of the self-help defense and inquired into whether the accused believed the defense was available to him. Only after the accused admitted the defense was not applicable in his case did the military judge accept his plea of guilty.⁴⁵

In affirming *Gunter*, the ACMR recognized the continuing validity of the self-help defense. The ACMR, however, said the defense was not raised when the military judge conducted a thorough inquiry that eliminated any possible inconsistency.

Conclusion

Until the COMA makes an affirmative statement as to the continuing validity of the self-help defense, an argument could be made that would support the holdings in either *Martin* or *Gunter*. The ACMR's decision is the better reasoned of the two decisions because *Martin* confuses two different defenses that are in no way connected. The self-help defense is not dependent on, nor in any way related to, the innocent purpose defense discussed in *Martin*. Additionally, Judge Mollison failed to consider that self-help will provide a defense to the larcenous *mens rea* aspect of a robbery, such as in *Martin*, but not the assault aspect.

Army trial and defense counsel should continue to assume the self-help defense is valid. Defense counsel certainly should use *Gunter* as a reminder to ask their clients the reasons for any larcenous taking. Major Hunter.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in

³⁷United States v. Eggleton, 47 C.M.R. 920 (C.M.A. 1973).

³⁸United States v. Petrie, 1 M.J. 332 (C.M.A. 1976) (no defense to charge of robbery that accused took money from victim to recover value of hashish, which he believed victim had stolen from him).

³⁹United States v. Smith, 14 M.J. 68 (C.M.A. 1982).

⁴⁰United States v. Martin, 37 M.J. 546, 548 (N.M.C.M.R. 1993).

⁴¹*Id.* at 549 (citations omitted). An accused sometimes raised the "innocent purpose" doctrine to negate any criminal *mens rea* in relation to a taking of property. For example, in *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983), the accused, a military policeman, claimed he broke into three storage bunkers and took military ammunition for the purpose of showing a lack of security measures at the facilities. In *United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984), the accused claimed to have taken a military police portable radio as a joke "just to see how long it would take someone to find out it was missing."

⁴²*Martin*, 37 M.J. at 549.

⁴³*Id.*

⁴⁴United States v. Gunter, 37 M.J. 781 (A.C.M.R. 1993).

⁴⁵*Id.* at *784.

the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Does the SSCRA Toll Statutes of Limitations for All Proceedings?

On March 31, 1993, the Supreme Court decided *Conroy v. Aniskoff*,⁴⁶ stating that the statute of limitations tolling provision of The Soldiers' and Sailors' Civil Relief Act (SSCRA), section 525, means exactly what it says and does not condition its protection on whether a service member can show hardship or prejudice because of military service. Unanswered is whether section 525 means what it says when applying the tolling provision to "any action or proceeding in any court, board, bureau, commission, department, or other agency of government . . ."⁴⁷ Despite the literal language of the Act, and even after the *Conroy* case, jurisdictions apparently differ whether section 525 tolls statutes of limitations for all, or just some, administrative and civil proceedings involving service members⁴⁸—particularly when another statute containing time limitations also applies in the case. In *Allen v. Card*,⁴⁹ the court determined that the SSCRA did not toll the three-year period for filing complaints with the Board for Correction of Military Records (BCMR).⁵⁰ Even though the government conceded that a literal reading of section 525 would encompass the time period for filing with the BCMR, it contended, and the court agreed, that a plain reading of the SSCRA would virtually eviscerate the BCMR statute by making it inapplicable to active duty service members. Stating that the "plain meaning of the statute cannot be relied upon when it would yield a clearly unintended result,"⁵¹ the court concluded that the BCMR statute of limitations controls and is not tolled by the SSCRA. Citing *Mai v. United States*,⁵² the *Allen* court felt that strictly applying section 525 to a board proceeding

involving only military personnel would have a significant negative impact, whereas applying it to actions before a civilian court—which involve civilian as well as military plaintiffs—would not.

In a more recent bankruptcy case, *In re Robins Co., Inc. v. Dalkon Shield Claimants Trust*,⁵³ the Fourth Circuit applied the SSCRA strictly, finding that the "plain language of [the SSCRA] requires that time periods such as that fixed by the bar date [for filing claims against A.H. Robins as part of the Chapter 11 reorganization plan] be tolled in favor of military personnel . . ." Of interest is the court's statement that "[the SSCRA] contains no exceptions and is drafted in extraordinarily broad terms. . . . [S]ection 525 itself contains no hint of an exception for bankruptcy or any other type of proceeding . . ."

Even though the *Robins* case was decided after *Conroy* and seems to reiterate the Supreme Court's admonition that section 525 should be strictly construed, the claims court in *Miller v. United States*,⁵⁴ refused to do so in dealing with yet another BCMR case. Failing to mention *Conroy* in its opinion, the court agreed with *Allen*, finding that the SSCRA tolling provision does not apply to actions before the BCMR, because to do so would have the opposite effect of that intended by Congress in enacting the SSCRA. The purpose of the SSCRA, in the court's opinion, was to protect service members from "civil liability" which might arise during their military service, not to weaken the military by limiting its "discretion to conduct its internal affairs."

Besides BCMR cases, courts are reluctant to apply the SSCRA tolling provision in some other situations. In an older non-BCMR collective bargaining case,⁵⁵ the First Circuit agreed with the lower court that while the SSCRA protected only the interests of servicemen, the armed services tolling provision of the National Labor Relations Act⁵⁶ struck a balance between "compelling interests of a strong national

⁴⁶ 1993 WL 89113 (Mar. 31, 1993), rev'g 599 A.2d 425 (Me. 1992). Discussed in an earlier TJAGSA Practice Note, Legal Assistance Items, *Soldiers' and Sailors' Civil Relief Act Update: Section 525 Means What It Says*, ARMY LAW., June 1993, at 50.

⁴⁷ 50 U.S.C. App. § 525 (1990), as amended by Pub. L. No. 102-12 (18 Mar. 1991) (emphasis added).

⁴⁸ The question of tolling applies to service members as either plaintiffs or defendants.

⁴⁹ 799 F. Supp. 158 (D.C. Cir. 1992).

⁵⁰ 10 U.S.C. § 1552(b) governs the time for filing with the BCMR: "No correction may be made . . . unless the claimant . . . files a request therefore . . . within three years after he discovers the error or injustice However, [the] board . . . may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice." This case involved the Coast Guard BCMR.

⁵¹ *Allen*, 799 F. Supp. at 161.

⁵² The Claims Court applied the SSCRA tolling provision to allow it to hear the case, but agreed that section 525 did not apply to the underlying Air Force BCMR proceeding. 22 Cl. Ct. 664 (1991).

⁵³ 1993 WL 217492 (4th Cir. June 22, 1993).

⁵⁴ 1993 WL 315025 (Fed. Cl. Aug. 13, 1993). This case involved the Coast Guard BCMR.

⁵⁵ *Mouradian v. John Hancock*, 1989 WL 225052 (1st Cir. 1989), remanded 751 F. Supp. 272 (D. Mass. 1990), aff'd 930 F.2d 972 (1st Cir. 1991).

⁵⁶ 29 U.S.C.A. § 160(b) (1990). Section 10(b) extends the period of limitations only if the person aggrieved was prevented from filing because of his or her military service (unlike § 525 of the SSCRA which requires no showing of material affect for its tolling provision to apply).

defense and the desire for repose in labor relations," and that under settled rules of statutory construction "a more specific statute . . . should take precedence over a more general one, such as the SSCRA."⁵⁷

In light of its rationale in *Robins*, it would be interesting to see how the Fourth Circuit would deal with similar cases. Whether section 525 "means what it says" may once again come before the Supreme Court. Major Hostetter.

Tax Notes

Electronic Filing of Federal Income Tax Returns

Electronic filing of tax returns is a valuable service for our legal assistance clients. Electronic filing is one of the major components of tax assistance services at many installations, allowing taxpayers to submit their returns electronically instead of filing a paper return with the Internal Revenue Service (IRS). According to the IRS, electronic filing promotes faster and more accurate return processing and quicker refunds.

To electronically file tax returns, legal assistance offices must have the following:

- a. A method of converting tax returns to electronic impulses—the tax preparation software; and
- b. A method of transmitting those impulses to the IRS—transmission capability.

Legal assistance offices desiring to participate in electronic filing must submit *IRS Form 8633, Application to Participate in the Electronic Filing Program*, to the IRS center for the state in which the office is located. For example, a legal assistance office located in Maryland would send its application to the IRS Andover Service Center in Massachusetts. Legal assistance offices that participated previously in electronic tax filing do not have to submit a new *Form 8633* unless information contained in the original application has changed. The IRS annually publishes a handbook, *Publication 1345, Handbook for Electronic Filers of Individual Income Tax Returns*. It contains an overview of the electronic filing program; explanations of the application and acceptance processes; a description of electronic returns and how they are filed; and general information for use by electronic tax filers. The handbook also contains "Revenue Procedure 91-69, Obligations of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return." This prescribes electronic tax filers' obligations to the IRS and others once they begin participation in the program.

Legal assistance offices must be careful to verify the taxpayer's documentation to ensure the return is accurate. The IRS monitors electronically filed returns for suspicious factors that may indicate a fraudulent return. According to the IRS, fraud attempts by individual taxpayers usually involve inflating legitimate expenses and deductions or filing several returns claiming refunds.

With electronic filing, taxpayers can elect to have their refunds deposited directly to a designated bank account. Before the refund check is deposited, however, the IRS checks to see if the taxpayer owes money to the government—such as, defaulted student loans or delinquent child support payments. If the taxpayer owes money, then the IRS uses the tax intercept program to take the refund and apply it toward the indebtedness.

Although seizure by the IRS of a refund does not directly impact tax assistance services, it does affect commercial tax preparers that offer refund anticipation loans to their customers. If the commercial tax preparer lends money to the customer and the refund never is deposited in the servicing bank's account, the lending institution will turn to the customer for repayment of the loan. Consequently, you may have a legal assistance client who has to figure out a way to repay this loan once he or she realizes that the refund is not available for that purpose. Only then do some taxpayers realize that they signed loan paperwork. Moreover, many are more surprised to learn how high the interest rate is.

The IRS made some changes for the 1993 filing season (tax year 1993) that will affect electronic tax filing. First time electronic filers must file a paper return because this is the category of filers most likely involved in filing fraudulent returns. The IRS will check IRS records before a return is accepted for processing to verify that the *Form W-2* contains a valid employer identification number. The IRS will validate the social security numbers of children listed on returns claiming the earned income credit before accepting a return for processing. The IRS also will require preparers to advise the IRS whether the taxpayer is seeking a refund anticipation loan.

Electronic filing of federal income tax returns benefits many military taxpayers and is an important part of aggressive tax assistance services. Legal assistance offices are urged to emphasize its importance to the command and make it as widely available to the military community as possible. Major Webster.

The Armed Forces Tax Council

The Department of Defense (DOD) created the Armed Forces Tax Council (AFTC) on 1 December 1988.⁵⁸ Several offices within DOD provide members for the AFTC. Each of

⁵⁷ The court recognized that if the SSCRA applied in this case, it would have tolled the limitations period regardless of "material effect."

⁵⁸ See Dep't of Defense Directive 5124.3, Armed Forces Tax Council (Dec. 1, 1988).

the Service Secretaries designates a representative. The Assistant Secretary of Defense (Force Management and Personnel) designates the Executive Director (formerly called the chair). The Assistant Secretary of Defense (Reserve Affairs), DOD Comptroller, and DOD General Counsel each designate another member.

The AFTC coordinates matters affecting federal, state, local, and foreign tax liabilities of service members and the related obligations of the military departments as employers. The AFTC coordinates current and proposed DOD publications and requests rulings and comments on tax matters from the Treasury Department, the IRS, and state taxation authorities. It also reviews and makes legislative proposals affecting the tax obligations of service members and the military departments; requests interpretations of tax laws as required by DOD offices; and provides advice on tax policy matters.

This summer, the AFTC was involved with the following federal, state, and local tax issues:

- increasing the combat zone tax exclusion from \$500 to \$2000 for each month an officer serves in the combat zone;⁵⁹

- providing tax relief for service members who receive Homeowners Assistance Program benefits because of base closures;

- evaluating the scope of Internal Revenue Code (IRC) section 134 on "qualified military benefits" and whether the statute should be amended; and

- requesting intervention in state and local tax cases when a taxing authority violates the provisions of the Soldiers' and Sailors' Relief Act of 1940 regarding taxation of personal property—that is, the so called "use tax" is in reality a personal property tax on a service member's car.

Legal assistance attorneys should be aware of a memorandum issued by DOD General Counsel requiring DOD attorneys to obtain approval from the DOD Office of General Counsel and from the general counsel of their military departments before requesting rulings or opinions of issues with general military applicability from non-DOD agencies—that is, the IRS and Treasury Department. Army attorneys who wish to raise such issues so as to obtain rulings or opinions on tax matters should send their requests to the Army AFTC representative at the Legal Assistance Division, Office of The Judge Advocate General, 2200 Army Pentagon, Washington, D.C. 20310-2200. Major Webster.

Facsimile Precautions

American Bar Association Formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials, is discussed in the Professional Responsibility Notes elsewhere in this issue. That opinion cautions attorneys who receive facsimile transmissions erroneously. Attorneys who fax documents may find the following precautions useful.

Before faxing a document protected by the attorney-client privilege—such as a draft separation agreement or a will provision—legal assistance attorneys should call to alert the intended recipient of the pending transmission and to confirm the fax machine telephone number.

Adding a cover sheet identifying the intended recipient and including a fax warning also should be standard practice. The following language is recommended:

"The information contained in this facsimile message is attorney-client privileged, and/or confidential information. It is intended only for the use of the named individual(s) to whom it is addressed. If you are not the intended party, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that you should refrain from examining the materials and that any review, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us at the above telephone number."

After sending the fax, the prudent legal assistance attorney or clerk should confirm telephonically that the intended recipient actually received the transmission. Lieutenant Colonel Hancock.

Eligibility for Legal Assistance

Women seeking assistance with paternity allegations frequently visit legal assistance offices. Are these individuals eligible for legal assistance services? Do they qualify as representatives of the child who may prove to be a military dependent?

Army Regulation (AR) 27-3,⁶⁰ specifically identifies persons eligible for legal assistance. Although the list of those eligible is lengthy, no specific authorization has been created for the otherwise unaffiliated client with a paternity allegation, or for services on behalf of a child that may at some future date become a family member. Paragraph 2-5b puts an express burden of demonstrating eligibility on the prospective client. Examples of proof cited are military identification cards, military orders, "or other documentation."⁶¹

⁵⁹ See generally I.R.C. § 112 (Maxwell Macmillan 1992).

⁶⁰ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 2-5 (30 Sept. 1992).

⁶¹ *Id.* para. 2-5b.

The closer question—in light of this guidance—is whether legal assistance can be provided to a woman who has a written admission of paternity from a soldier. Because an admission alone generally will not provide a basis for family member status absent formal acknowledgement or judicial declaration of paternity, the reasonable conclusion is that eligibility has not been established.

What, if anything, should you do for this presently ineligible, but clearly potential client? First, because any legal help would be outside the scope of the legal assistance program, you should not form an attorney-client relationship with this person. Consistent with AR 27-3, you may help the person seeking assistance by making a referral to a civilian attorney or to a state office of child support enforcement.⁶² You also may provide information on the present unit of assignment of the soldier alleged to be the father (or father-to-be). If not known, this information can be obtained from, and released by, your installation military personnel office, personnel service company, or special actions/personnel actions section for any soldier in the Army regardless of assignment.⁶³

Should we—as well as other attorneys in the office—provide this limited help? The answer is an unqualified “yes.” The Army provides this type of help everyday and not just from lawyers. Although this is not legal assistance, we—and others on the installation—should, consistent with applicable laws and regulations, try to be as helpful to the public as is possible. It is much easier to provide this limited help orally, than to do so by letter on a later date in response to a congressional inquiry or a letter from an attorney. Furthermore, such assistance is consistent with the spirit of AR 608-99, for which The Judge Advocate General is now the proponent.

Why do we not formally represent unaffiliated women with paternity allegations. Quite simply, legal assistance, as an official function of the Army, which authorizes use of government facilities and resources and defines the limits of the Army's liability for our efforts, is limited to specific services for eligible clients. Ensuring that our efforts are focused on eligible clients not only protects lawyers individually, but preserves what we well know to be scarce resources. Major Block.

Contract Law Notes

Funding Issues in Operational Settings

This practice note provides an analytical model to assist judge advocates in evaluating the propriety of using operation and maintenance funds in operational settings for certain types of construction and materiel acquisitions. This note interprets existing statutes and regulations; it does not provide policy direction.

During Operations Desert Storm, Desert Shield, and Restore Hope, commanders of United States forces believed that they faced statutory and regulatory fiscal restrictions which impeded the effective accomplishment of their missions in the Persian Gulf and in Somalia. A recent article in *The Army Logistician* identified one restriction—the \$300,000 per project statutory limitation on the use of operation and maintenance funds for minor construction⁶⁴—as an impediment to mission accomplishment that should be changed.⁶⁵

Whether this restriction is truly an operational impediment is uncertain. The text of the statute containing the dollar limitation⁶⁶ is silent about its application in contingency opera-

⁶²*Id.* para. 3-8a.

⁶³See DEP'T OF ARMY, REG. 608-99, PERSONAL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 1-6d (22 May 1987).

⁶⁴This restriction is codified at 10 U.S.C. § 2805(c)(1) (supp. IV 1992).

⁶⁵Pagonis & Krause, *Observations on Gulf War Logistics*, THE ARMY LOGISTICIAN, Sept.-Oct. 1992, at 5. The article states, “[t]heater commanders are not authorized to award contracts more than \$200,000 [sic] each. This limit is a tremendous barrier to a commander faced with the prospect of war in a theater with little infrastructure.” *Id.* at 8. The article apparently refers to 10 U.S.C. § 2805(c)(1), which currently permits not more than \$300,000 of operation and maintenance funds to be used per unspecified minor construction project. During the Gulf War, the limitation was \$200,000 per project. The National Defense Authorization Act for 1992, Pub. L. No. 102-190, § 2807, 105 Stat. 1540, 1563 (1991), increased the dollar limitation to \$300,000.

⁶⁶The text of 10 U.S.C. § 2805 (1988 & supp. IV 1992) is as follows:

(a)(1) Except as provided in paragraph (2), within an amount equal to 125 percent of the amount authorized by law for such purpose, the Secretary concerned may carry out minor military construction projects not otherwise authorized by law. A minor military construction project is a military construction project (1) that is for a single undertaking at a military installation, and (2) that has an approved cost equal to or less than \$1,500,000.

(2) A Secretary may not use more than \$5,000,000 for exercise-related unspecified minor military construction projects coordinated or directed by the Joint Chiefs of Staff outside the United States during any fiscal year.

(b)(1) A minor military construction project costing more than \$500,000 may not be carried out under this section unless approved in advance by the Secretary concerned.

(2) When a decision is made to carry out a minor military construction project to which paragraph (1) is applicable, the Secretary concerned shall notify in writing the appropriate committees of Congress of that decision, of the justification for the project, and of the estimated cost of the project. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by the committees.

(c)(1) Except as provided in paragraph (2), the Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified military construction project costing not more than \$300,000.

(2) The authority provided in paragraph (1) may not be used with respect to any exercise-related unspecified military construction project coordinated or directed by the Joint Chiefs of Staff outside the United States.

(d) Military family housing projects for construction of new housing units may not be carried out under the authority of this section.

tions,⁶⁷ such as Operation Desert Shield in Saudi Arabia and Operation Restore Hope in Somalia. Nevertheless, the Army previously has interpreted this language as applying to all minor construction projects, regardless of the circumstances.⁶⁸

Although the Army's longstanding interpretation of 10 U.S.C. § 2805(c) is consistent with the text of the statute, this provision may not preclude the expenditure of operation and maintenance funds in excess of the \$300,000 statutory ceiling for construction projects in direct support of overseas contingency operations.⁶⁹ Similarly, materiel acquisitions—that normally would be improper using operation and maintenance funds—may be permissible when such acquisitions directly support an operational mission. This interpretation of the statute may comport with congressional intent during a contingency operation because Congress provides the Army with operation and maintenance funds to pay for its day-to-day operating expenses. In an overseas contingency deployment, the day-to-day operations of the Army are substantially different than they are in the United States or in a permanently established overseas location. The Army's day-to-day mission during a contingency may include the acquisition of high-value materiel to remove it from the arsenal of an opposing force, or the construction of facilities costing more than \$300,000 that clearly are operational in nature, and that are intended for temporary use only during the contingency mission.

In the case of contingency construction, facilities built with operation and maintenance funds and costing more than \$300,000, must support the operational activities of United States forces, and be of a temporary nature.⁷⁰ This statutory interpretation does not extend so far as to sanction construction projects exceeding \$300,000 in cost that will serve as permanent operating bases for future deployments, or that will become permanent humanitarian infrastructure.⁷¹ The normal military construction rules⁷² apply in these two situations, as well as in other normal construction situations inside the United States or within established overseas theaters.

A related issue arises in situations where operational need dictates that United States forces make acquisitions in overseas settings that might otherwise require the use of procurement appropriations.⁷³ Specifically, during Operation Restore Hope United States forces needed to acquire weapons from rival war lords and armed bandits, to remove these items as potential threats to United States and coalition forces, and to achieve the goals of the Army's peacemaking and peacekeeping mission. Normally, the Army acquires weapons using a procurement appropriation.⁷⁴ During Operation Restore Hope, however, operation and maintenance funds were appropriate for these purchases, because the Army procured the weapons—not for its normal weapons inventory—but as the most effective means of achieving its operational objectives. This note adopts a pragmatic, fact-driven, analytical frame-

⁶⁷The term "contingency operation" means a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are, or may become involved in, military action, operations, or hostilities against an enemy of the United States or against an opposing force; or a military operation which results in the call or order to, or retention on, active duty of members of the uniformed services during a declared war or national emergency. *Id.* § 101(a)(13).

⁶⁸See DEP'T OF ARMY, REG. 415-35, CONSTRUCTION: MINOR CONSTRUCTION, EMERGENCY CONSTRUCTION, AND REPLACEMENT OF FACILITIES DAMAGED OR DESTROYED, glossary (15 Sept. 1983) (definition of minor construction); DEP'T. OF ARMY, PAMPHLET 420-8, FACILITIES ENGINEERING MANAGEMENT HANDBOOK, ch. 9 (C1, 15 Mar. 1985) (providing examples of the application of the statutory limitation).

⁶⁹Mr. Matt Reres, Deputy General Counsel for Fiscal Law and Policy, Office of the General Counsel, Department of the Army, presented this position at a seminar held at The Judge Advocate General's School's 1993 Government Contract Law Symposium, on January 12, 1993.

⁷⁰41 U.S.C. § 12 (1988) provides that no public contract relating to erection, repair, or improvements to public buildings shall bind the government for funds in excess of the amount specifically appropriated for that purpose. The General Accounting Office has interpreted this code provision to require that Congress specifically authorize in appropriations acts all military construction projects, and to prohibit the normal use of general appropriations for such projects. To the Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984). The authorization of 10 U.S.C. § 2805(c) to use operation and maintenance funds of up to \$300,000 for unspecified minor construction projects is a statutory exception to this restriction. Arguably neither 41 U.S.C. § 12 nor 10 U.S.C. § 2805(c) prohibits the construction of operationally expedient, temporary structures and facilities built to further a contingency mission, rather than to serve as "public buildings."

⁷¹Application of this analysis where the United States has a continuing or follow-on mission is inappropriate. Therefore, even during a contingency mission, the construction of POMCUS (pre-positioned materiel configured in unit sets) storage sites or permanent hospitals with operation and maintenance funds would be improper.

⁷²For a new construction requirement, the normal military construction rules require: a specific military construction appropriation if the project's cost will exceed \$1.5 million; the use of unspecified minor construction funds if the project will cost more than \$300,000, but not in excess of \$1.5 million; and the use of operation and maintenance funds if the project's cost will not exceed \$300,000. See *supra* notes 66, 70.

⁷³The Department of Defense Budget Manual requires that end items costing more than \$15,000 each, and all items that are centrally managed, be acquired using procurement appropriations. DEP'T OF DEFENSE MANUAL 7110.1-M, BUDGET GUIDANCE MANUAL, ch. 241.4 (May 1990).

⁷⁴See Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954), in which the Comptroller General opined that an expenditure by an executive agency is improper if the agency uses funds other than those specifically appropriated for a stated purpose. Congress specifically appropriates funds to the Army each year for weapons procurement. See, e.g., Dep't of Defense Appropriations Act of 1993, Pub. L. No. 102-396, title III, 106 Stat. 1876, 1886 (1992). The intent of such appropriations clearly is to fund the Army's procurement of weapons for its own use, however, not to pay for the removal of weapons from the hands of its potential opponents in a contingency situation.

work. It articulates a rationale for using operation and maintenance funds to support essentially all direct operational requirements. The analysis set forth in this note is an interpretation of current regulatory and applicable statutory language. This note is not intended to encourage circumvention of the normal funding rules and fiscal restrictions imposed by statute and implemented by Army regulations. If units or activities use this analysis to support expenditures of operation and maintenance funds in lieu of other appropriations in situations where the facts do not clearly support the operational necessity of the funding requirement, then responsible individuals run a substantial risk of violating the "Purpose Statute"⁷⁵ or the Antideficiency Act.⁷⁶ Lieutenant Colonel Dorsey.

Default Termination Update

All too often, government contractors fail to perform their contracts on time. While a contractor's failure to meet the delivery schedule normally permits the government to terminate for default,⁷⁷ both contractor and government personnel recognize that a "termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence."⁷⁸ Accordingly, the government often is reluctant to terminate for default even when circumstances permit.⁷⁹ Unfortunately, the government's failure to terminate immediately may cause problems.

A recent Armed Services Board of Contract Appeals case, *Lanzen Fabricating, Inc.*,⁸⁰ illustrates the problems the gov-

ernment may encounter when it fails to terminate for default in a timely manner. The case demonstrates the importance of correctly using the show cause letter and cure notice required by the federal acquisition regulation (FAR) and the default clauses.⁸¹ The case also demonstrates the need to establish a new delivery schedule when the contractor fails to meet the original delivery date and the government unduly delays making its termination decision.

In *Lanzen*,⁸² under a fixed-price supply contract with the Navy, the contractor failed to deliver metal instrument cases by the original delivery date. After the delivery date, however, the Navy encouraged Lanzen to continue performance, receiving and evaluating a partial shipment of instrument cases one month after the delivery date.⁸³ The Navy took almost four additional months to complete its evaluation of the partial delivery.⁸⁴

Under these circumstances, the Navy waived the original delivery schedule.⁸⁵ Nevertheless, it failed to establish a new schedule. Instead, the Navy attempted to enforce the original delivery date by issuing a belated "show cause" letter.⁸⁶ The letter stated that Lanzen was "failing to make progress so as to endanger performance," and gave Lanzen ten days in which to present "a detailed plan for curing the conditions endangering performance."⁸⁷ When Lanzen failed to respond within the ten-day period, the Navy terminated the contract for default based on the contractor's failure "to perform to the specifications of the contract."⁸⁸

⁷⁵ 31 U.S.C. § 1301(a) (1988).

⁷⁶ *Id.* § 1341(a) (supp. II 1990); see also DEP'T OF DEFENSE MANUAL 7220.9-M, DEP'T OF DEFENSE ACCOUNTING MANUAL, ch. 21, ¶ E.4.e. (1 Oct. 1983) (C6, 6 Oct. 1987) (obligations or expenditures in excess of statutory ceilings, even if amounts of appropriations or their formal subdivisions are not exceeded, violate the Antideficiency Act).

⁷⁷ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 49.402-1 (1 Apr. 1984) [hereinafter FAR]; FAR 52.249-8.

⁷⁸ *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987).

⁷⁹ *Darwin Constr. Co., Inc. v. United States*, 811 F.2d 593 (Fed. Cir. 1987) (the decision to terminate is discretionary).

⁸⁰ ASBCA No. 40328 (May 24, 1993), 93-__ BCA ¶ __.

⁸¹ FAR 49.402; FAR 52.249-6, -8, -9 (default clauses).

⁸² *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-__ BCA ¶ __.

⁸³ *Id.* Lanzen had made an earlier partial delivery, which the government rejected. Lanzen continued to perform based on an understanding by both parties that Lanzen would correct the defects.

⁸⁴ *Id.* Within the government considerable debate existed about whether the contractor should correct the defects, or whether the government should accept the items at a reduced price.

⁸⁵ *Id.*, accord *S.T. Research Corp.*, ASBCA No. 39600, 92-2 BCA ¶ 24,838 (delivery schedule waived when the government encourages the contractor to continue performance after the delivery date).

⁸⁶ The Navy's letter was entitled "Show Cause," but contained much of the language found in a cure notice. *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-__ BCA ¶ __; see also FAR 49.607.

⁸⁷ *Lanzen Fabricating, Inc.*, ASBCA No. 40328 93-__ BCA ¶ __. A cure notice is required before terminating a contract for the contractor's failure to make progress. Although not specifically decided, the Board appeared willing to accept the Navy's argument that a show cause letter could meet the requirements of a cure notice. The Board, however, made it clear that this letter did not.

⁸⁸ *Id.*

In its decision, the Board predictably found that the Navy had waived the original delivery schedule.⁸⁹ Without a delivery schedule, the contractor had no date by which it was required to perform. Accordingly, it could not be in default for failing to make progress toward completion on an indefinite delivery date. Therefore, the default termination was improper.

Lessons Learned

Whenever the government fails to exercise its right to terminate a contract for default when the contractor fails make timely delivery of conforming goods, it runs the risk of "waiving" the delivery schedule.⁹⁰ When the circumstances indicate that waiver has occurred, the prudent course of action is to establish a new delivery date. As the Board noted:

[T]o reestablish a contractual delivery schedule making time again of the essence the Government is obliged either to (a) reach agreement with the contractor on a new delivery schedule or (b) give the contractor notice setting a specific new time for performance which must be reasonable at the time the notice is given.⁹¹

A contractor's unexcused failure to meet the new delivery schedule would provide the government with a valid basis to terminate the contract for default.⁹²

Another lesson to learn from this case is that the government must use the two different required written notices correctly. The "cure" and "show cause" notices are two distinct

instruments; they are used at different times and for different purposes.⁹³ The default clause requires a cure notice when the basis for the default is the contractor's failure to make progress or to perform any other provision of the contract.⁹⁴ The FAR also requires a cure notice "whenever a contract is to be terminated before the delivery date."⁹⁵ The purpose of the cure notice is to inform the contractor of the potential default termination, identify the deficiencies in performance, and provide the contractor the opportunity to cure the deficiencies.⁹⁶

A show cause notice should be used whenever a termination for default is appropriate.⁹⁷ Although not required, it must be used "when practicable."⁹⁸ Contracting officers should send show cause notices immediately on expiration of the delivery period, using the format provided in the FAR.⁹⁹ The purpose of the show cause letter is *not* to provide the contractor an opportunity to "cure" anything. Instead, the show cause letter informs the contractor that it is in default, that the government is contemplating terminating the contract, and that the contractor has an opportunity to identify any reasons why the default is excusable.¹⁰⁰

Although drastic, a default termination is sometimes necessary. Government personnel must protect the government's right to terminate a contract for default, and not permit the right to lapse through inaction. Ensuring that contractual delivery dates are reasonable, and using the prescribed notice instruments to communicate with contractors who are in default, will help the government preserve the right to terminate contracts for default. Major Melvin.

⁸⁹Both the default clause at FAR 52.249-8 and FAR 49.607(a) require a cure notice before the government may terminate a contract for default before the delivery date. In administering Lanzen Fabricating's contract, the government put itself in the position of not even being able to issue a proper cure notice—let alone a default termination—by not first reestablishing a contract delivery date.

⁹⁰Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969).

⁹¹Lanzen Fabricating, Inc., ASBCA No. 40328, 93 __ BCA ¶ __. The contractor's response to a cure notice may provide the information necessary for the government to establish an enforceable delivery schedule.

⁹²Tampa Brass & Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865.

⁹³FAR 49.607.

⁹⁴FAR 52.249-8(a)(1)(ii); (iii).

⁹⁵FAR 49.607(a).

⁹⁶The notice should follow the format found at FAR 49.607(a).

⁹⁷FAR 49.402-3(e)(1).

⁹⁸*Id.*

⁹⁹FAR 49.607(b).

¹⁰⁰A default termination is not proper when the contractor's failure to perform is due to causes beyond its control and without its fault or negligence. FAR 49.402-3; 52.249-8.

Claims Report

United States Army Claims Service

Personnel Claims Note

The following guidance will assist claims offices in pursuing these recoveries:

Increase in Carrier Liability— Overseas Shipments

The United States Army Claims Service (USARCS), along with other military claims services, continues to negotiate with the Military Traffic Management Command (MTMC) and the carrier industry to extend increased release valuation (IRV) coverage (liability calculated at \$1.25 times the net weight of the shipment) to overseas household goods shipments. Although the USARCS, MTMC, other military claims services, and the carrier industry have yet to reach this result, an interim remedy has been adopted—pending completion of a General Accounting Office audit—to increase carrier liability on overseas shipments from the current sixty cents per pound per article to \$1.80 per pound per article—a *three-fold increase*.

This new "\$1.80 liability" applies to Codes 4, 5, 6, 7, 8, J, and T shipments, and *will go into effect 1 October 1993*. This new liability will apply to all personal property shipments occurring on or after this date. Calculation of carrier liability will remain unchanged except that \$1.80 is substituted for sixty cents.

This increase should provide financial and quality control incentives for the carriers involved in overseas shipments to move soldiers' personal property with greater care and will provide additional recovery funds that can be used to pay soldiers' claims. Accordingly, increased involvement by carriers in field claims offices' recovery actions is likely. They will be paying larger amounts for damage than before, and where it might have been cost effective not to question our recovery procedures under the sixty cents liability, this three-fold increase will cause the carriers to scrutinize closely how field claims offices reach their demands.

Regarding only these types of overseas shipments, all field claims offices will pursue recoveries up to \$300. Otherwise your claims offices' baseline (monetary) jurisdiction for recovery actions remains unchanged, and your baseline jurisdiction will remain \$100 for non-IRV shipments picked up before 1 October 1993.

a. *Substantiation of loss/damage.* Recovery action must be initiated as soon as possible after payment of a claim. Because the carrier is liable for a much greater amount, greater care must be taken in justifying our recovery action. Documentation to the carrier must be complete.¹ Adjudicator comments on the chronology sheet are extremely helpful, especially in convincing the carrier to accept liability for missing items, items with preexisting damage, and items with internal damage. Any information not otherwise reflected in the file *must be entered* on the chronology sheet. Have the claimant provide a written statement about high-value items that need further explanation than what is required on the *DD Form 1844*.² Do not hesitate to call repair firms and ask for details of their evaluation of damaged items. If necessary, visit the soldier's residence to view the items.

b. *Carrier inspections and salvage rights.* As carriers must pay larger amounts in recovery settlements, undoubtedly they will become increasingly critical of the validity of claims payments. Carriers may exercise their right to inspect items when their potential liability covers full repair or replacement costs. In cases where potential liability will cover replacement costs, carriers also may exercise their salvage rights. These instances probably will occur more often after the new \$1.80 liability is imposed. Claims offices are reminded of their responsibility to assist carriers if they need help setting up appointments with claimants.³ Claims offices also are reminded to inform claimants *not* to turn in or throw away items which carriers may want, and claims offices must make appropriate adjustments to the claimant's payment and to the carrier liability calculations if the claimant wants to keep a destroyed item.⁴

¹ DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, paras. 2-38 to 2-41 (15 Dec. 1989) [hereinafter DA PAM 27-162].

² Dep't of Defense, DD Form 1844, List of Property and Claims Analysis Chart (Feb. 1989).

³ See DA PAM 27-162, *supra* note 1, para. 2-55a(6).

⁴ *Id.* paras. 2-44, 2-55a(6),(8), and 3-8d(4)(a) to (e).

c. *Deductions of potential carrier recovery.* Direct particular attention to timely notice of damage to all items claimed before payment is authorized. When a claimant fails to take proper exceptions on *DD Form 1840/1840R*, the claimant could be penalized a sizable portion of the amount claimed because of deductions for potential carrier recovery (PCR) that cannot be pursued. The greater the liability potential of the carrier, the greater the possible deduction of payment to the claimant if timely notice is not provided. Remember: In claims where potential carrier recovery is taken from the claimant's payment, do not assert a carrier recovery claim for items on which carrier liability was deducted.⁵ To minimize the adverse impact of PCR deductions, consider a local news article to "get the word out" to potential claimants.

d. *Centralized recovery procedures.* All files forwarded to the USARCS for centralized recovery will include a demand packet.⁶ The *DD Form 1843* will be signed and the USARCS address will be listed as the "Reply to" address, but a dispatch date will not be entered. When appropriate, an unearned freight packet will be included in the file. Always enter the government bill of lading number (GBL) and the standard carrier alpha code (SCAC), but do not enter a "Demand Sent" date into the computer on files forwarded to the USARCS for recovery. Enter the "FR" transfer code on the computer and, after holding for twenty-one to thirty days from payment to allow for possible requests for reconsideration⁷—and to allow for disk processing at the USARCS prior to receipt of the claim—forward the following types of claims to the USARCS for dispatch of demand packets under centralized recovery procedures.

(1) Non-IRV shipments (code 4, 5, 6, 7, 8, J, and T) where the through government bill of lading (TGBL) carrier's liability

exceeds the baseline (monetary) jurisdiction of \$300. Note: On code 5 and T shipments, the fifty percent compromise amount must exceed the baseline cutoff figure, not the full liability.⁸ On code 7, 8, and J shipments, be sure to apply the policies stated in the USARCS message, dated 15 July 1993, subject: Carrier Recovery on Baggage Shipments.

(2) Increased release valuation shipments (code 1 and 2) where the TGBL carrier's liability exceeds the field claims office's \$500 or \$1000 baseline jurisdiction.

(3) Shipment claims involving liability by more than one party—that is, two or more TGBL carriers, a TGBL carrier and a nontemporary storage (NTS) warehouse, or a TGBL shipment in storage in transit (SIT) which converts to storage at the owner's expense and later is delivered under a service order.

(4) Shipment claims involving payment by a private insurer.⁹

(5) Mobile home shipments (code S).¹⁰

(6) Claims involving bankrupt TGBL carriers and TGBL carriers whose liability is uncollectable, as noted in various messages generated by the USARCS—the last two messages are dated 22 December 1992 and 10 August 1993, subject: Uncollectable Carriers. Note: Recovery on local contractors whose liability is uncollectable or who have filed bankruptcy must be pursued through local contracting offices.

(7) Claims involving single incidents that result in damage to more than one shipment—such as, defaults, SIT or NTS warehouse fires, floods, break-ins.

e. *Exceptions to centralized recovery.* The following claims will *not* be forwarded to the USARCS for centralized recovery:

⁵ *Id.* paras. 2-52, 2-55a(6).

⁶ *Id.* para. 3-21.

⁷ *Id.* para. 3-21b(3); DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 11-24a(6) [hereinafter AR 27-20].

⁸ See DA PAM 27-162, *supra* note 1, para. 3-10 for details.

⁹ *Id.* para. 3-30a.

¹⁰ *Id.* para. 3-16.

(1) All demands from European and Korean field claims offices will be forwarded to their respective command claims services for dispatch. European and Korean field claims offices do not assert demands locally. As an exception, however, European field claims offices may pursue local recovery on baggage shipments (code 7, 8, and J) only when directed to do so by United States Army Claims Service, Europe.

(2) The continental United States field claims offices and the United States Pacific Command and United States Southern Command claims services will dispatch the following types of demands (unless a private insurance payment, a mobile home claim, a bankrupt or uncollectable TGBL carrier, or a shipment involving more than one company involved exists):

(a) Non-IRV shipments (code 4, 5, 6, 7, 8, J, and T) when the TGBL carrier's liability is within the field claims office's baseline jurisdiction of \$300. Note: On code 5 and T shipments, the fifty percent compromise amount must be within the baseline cutoff figure, not the full liability.¹¹ On code 7, 8, and J shipments be sure to apply the policies stated in the USARCS message, dated 15 July 1993, subject: Carrier Recovery on Baggage Shipments.

(b) Increased released valuation shipments when the TGBL carrier's liability is within the field claims office's \$500 or \$1000 monetary jurisdiction. This category includes code 1 and 2 shipments under Basic IRV, Option 1 (higher valuation, also known as lump sum), or Option 2 (Full Replacement Cost Protection).¹²

(c) Direct deliveries from NTS.¹³

(d) Direct procurement method (DPM) shipments.¹⁴

(e) Local contract shipments.¹⁵

(f) Shipments involving liability of airlines¹⁶ or stevedoring contractors.¹⁷

f. Documentation in demands.

(1) Catalog cutouts. DA PAM 27-162, paragraph 3-22a(2)(g) describes the proper way to prepare demand packets for European recovery. A portion of this paragraph has particular relevance in light of issues raised by the carrier industry—the requirement that demand packets *not* include copies of catalog cutouts used to adjudicate replacement value. This should pertain to preparation of *all* demand packets. Catalog pages are of no value to verify ownership by the member or tender to the carrier, and they add bulk to the packet, which costs more to mail. Do *not* include copies of catalog cutouts in demands.

(2) Department of Defense Form 1840/1840R. Keep a copy of the completed 1840/1840R (showing entries in all blocks) in the claim file after the demand packet is prepared. Many carriers request a copy of this form at a later date and if the only copy in the file is incomplete, then recovery efforts are hindered because timely notice cannot be verified by the documentation in the claim. To avoid unnecessary rebuttals and appeals based on nonreceipt of timely notice because the carrier address was omitted or incomplete, enter the complete and correct address of the carrier to receive the 1840R. Examine these forms when the member drops off the initial paperwork and request all necessary information to be completed at that time, especially inventory numbers for missing items noted.

¹¹ *Id.* paras. 3-9 to 3-11.

¹² Information about these types of shipments can be found at *id.* para. 3-8.

¹³ *Id.* para. 3-12b.

¹⁴ *Id.* para. 3-15.

¹⁵ *Id.* para. 3-12a.

¹⁶ *Id.* para. 3-17.

¹⁷ AR 27-20, *supra* note 7, para. 11-33.

g. *Checks from third parties.* DA PAM 27-162, paragraph 3-23b and c must be clarified to avoid administrative complications generated by checks becoming "stale dated." Return insufficient checks to the sender prior to forwarding impasse files to the USARCS. Checks should not be included in files forwarded to the USARCS. Do not accept partial checks and then send the file to the USARCS for offset of the remaining amount due. Do not request files to be returned for deposit of checks received after the file leaves your office.

h. *Markings on the outside of file folders.* Various references to proper file folder markings required are found in AR 27-20,¹⁸ DA PAM 27-162,¹⁹ and *The Army Lawyer*.²⁰ The category "UNCOLLECTABLE" is required as instructed by pertinent messages referenced in 4f above. These marked categories are important to assist the USARCS personnel in properly and promptly distributing files to the correct area for further action.

i. *Retirement of closed claims.* Make sure a disk has been sent that reflects the proper transfer code ("FF") prior to forwarding the claim file for retirement. Hold closed claims for forty-five days to allow the computer disk data to be processed prior to receipt of the file at the USARCS.²¹ The instruction to forward them for retirement to JACS-BI-R, however, no longer is correct; they should be sent to JACS-PCR. Ms. Shollenberger.

1992 Affirmative Claims Report

In calendar year 1992, Army claims offices collected over \$13,199,958 in medical care recovery claims and \$1,241,406 in property damage recovery claims. Although property damage recovery was down slightly from 1991, all other statistics showed increases over 1991, including total recovery which increased by more than 2.9 million dollars. Army claims offices worldwide are to be commended for their successful efforts in the area of affirmative claims.

To equitably reward claims offices—regardless of size—for their achievements in affirmative claims, the USARCS utilizes a two-tiered recognition system. The top offices in total medical care recovery are recognized as are the top offices in total property damage recovery. Additionally, the offices that demonstrated the most improvement in medical care recovery and the offices that demonstrated the most improvement in property damage recovery also are recognized. Finally, United States Army Claims Service, Europe is receiving special recognition as the top office in total affirmative claims recovery.

The Judge Advocate General has issued Certificates of Excellence to those offices that have demonstrated superior achievement in the four awards categories. These offices are listed below in order of achievement:

a. Total Medical Care Recovery

(1) Brooke Army Medical Center, Fort Sam Houston;

(2) 7th Infantry Division (Light) & Fort Ord;

(3) United States Army Armor Center & Fort Knox;

(4) III Corps and Fort Hood; and

(5) I Corps and Fort Lewis.

b. Total Property Damage Recovery

(1) Joint Readiness Training Center and Fort Polk;

(2) United States Armed Forces Claims Service, Korea;

(3) 7th Infantry Division (Light) & Fort Ord;

(4) United States Army, Japan (Camp Zama); and

(5) I Corps and Fort Lewis.

¹⁸ *Id.* para. 11-30.

¹⁹ DA PAM 27-162, *supra* note 1, paras. 2-57e, 2-59d, 3-2h, 3-8a, b, c, d(3), 3-21a, 3-23a, b, d(1), 3-26b, c, d, e.

²⁰ Management Notes, *Sorting and Marking Claims Files Sent to USARCS*, ARMY LAW., June 1990, at 70.

²¹ DA PAM 27-162, *supra* note 1, para. 2-55o.

c. **Medical Care Recovery, Most Improved*:**

(1) 10th Mountain Division & Fort Drum;

(2) United States Military Academy at West Point;

(3) Combined Arms Command & Fort Leavenworth;

(4) United States Army, Japan (Camp Zama);

(5) 1st Infantry Division (Mechanized) & Fort Riley;

(6) United States Army Field Artillery Center & Fort Sill;

(7) United States Army Missile Command (Redstone Arsenal);

(8) United States Army Infantry Center (Fort Benning); and

(9) Fort McPherson.

d. **Property Damage Recovery, Most Improved*:**

(1) United States Army, Japan (Camp Zama);

(2) Fort Devens.

* Ten awards were allocated for the improvement categories. Only two offices demonstrated substantial improvement in property damage recovery so the remaining awards were issued for improvement in medical care recovery. Nine offices actually were recognized because two offices showed nearly the same level of improvement. Captain McNelis.

Management Note

New Codes for Fiscal Year 1994

There are two changes to the claims accounting codes for fiscal year (FY) 94.

The FY designator advances from "3" to "4." This is the *third* digit in the *first group* of digits in every claims payment or deposit accounting classification, making the first group of digits "2142020" instead of "2132020."

The Army Management Structure Code changes from "P202099" to "P436099." This is the beginning of the *third group* of digits in every claims payment or deposit accounting classification.

For example, the FY 94 accounting classification for a Chapter 11 (Personnel) claim is:

Payment 2142020 22-0201 P436099.11-4230 FAJA S99999

Deposit 2142020 22-0301 P436099.11-4230 FAJA S99999

Every claims office that pays claims—whether by manual voucher or electronically—must ensure that FY 94 has been entered in the installation accounting system. It may do so by contacting the system administrator at the servicing finance office.

Under no circumstances should a claims office use an FY 93 fund cite for claims certified for payment after the beginning of FY 94 (1 October 93). To determine if the servicing finance office is using the correct fiscal code, the claims office should review the accounting classification found on the bottom of the claims office's copy of a finance-generated payment voucher—that is, the pink copy of the payment voucher that the finance office sends to the claims office. Major Matthews.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following bar ethics opinions concern matters addressed in the Army's *Rules of Professional Conduct* for

*Lawyers (Army Rules).*¹ These items are offered for Army lawyers to consider as they ponder difficult issues of professional discretion. Lieutenant Colonel Fegley.

¹ DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (17 May 1992).

Bar Ethics Opinions

Army Rule 1.6 (Confidentiality of Information)

Impact of Paper Recycling on Confidentiality of Client Information

Two state legal ethics committees recently have addressed the impact of paper recycling on a lawyer's obligation to maintain the confidentiality of client information.

The North Carolina State Bar Ethics Committee concluded that, before giving work papers containing confidential information to a recycling business, attorneys have a duty to ascertain that the company's procedures minimize the risk of disclosure of confidential information.² The confidential information contained in some papers may be so sensitive that the only proper way to dispose of them is to destroy them (by shredding or other means).

The New York State Bar Association Committee on Professional Ethics held that lawyers subject to recycling laws also have a duty to ensure that compliance does not involve violation of the lawyer's obligation to maintain confidentiality of client information.³ Recycling ordinances are not inconsistent with rules governing professional responsibility; they merely prevent the disposition of work papers in an ecologically unsound manner. Accordingly, lawyers must comply with the recycling laws of jurisdictions in which they practice. Work papers containing confidences, however, must be discarded or destroyed in a manner consistent with a lawyer's obligation to maintain confidentiality. Lawyers must be familiar with applicable recycling laws and know what will happen to discarded papers placed in the trash or recycling containers. It is unacceptable for lawyers to place papers containing confidences in containers if the papers will be open to inspection outside the lawyers' offices. Lawyers have an obligation to screen all papers—either at the time of filing or at disposition—to determine whether disposal and recycling in their original form are appropriate, or whether shredding or some other form of disposition in compliance with recycling laws is required.

Inadvertent Disclosure of Confidential Materials (Use of Facsimile Machines and Electronic Mail to Transmit Confidential Information)

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility last year addressed situations where a lawyer received materials that on their face appear to be subject to the attorney-client privilege or other-

wise confidential, under circumstances where the materials clearly were not intended for the receiving lawyer.⁴ The committee recognized several scenarios and combinations of scenarios. The sending lawyer may notify the receiving lawyer of the erroneous transmission and request return of the materials sent. Second, the inadvertent sending lawyer and his client may remain ignorant that the materials were mis-sent. In either situation, the receiving lawyer may have reviewed the materials. Where the sending lawyer recognizes the error, he or she may intercede before the receiving lawyer has had the opportunity to review the materials. The committee noted that such situations have become more likely with the increase in multi-party litigation, extensive use of photocopying, and the increasing use of facsimile machines⁵ and electronic mail.

In all circumstances, the lawyer should refrain from examining the materials, notify the sending lawyer, and abide by the sending lawyer's instructions. In reaching this conclusion, the committee noted that one cannot rely on a narrow literalistic reading of the black letter of the *Rules of Professional Conduct for Lawyers (Rules)*. Rather, support is found in the preamble to the *Rules* which exhorts practitioners to exercise sensitive professional and moral judgment guided by the basic principles underlying the *Rules*. Specifically, the committee found support in the rule on maintaining client confidentiality, the law governing waiver of the attorney-client privilege, the law governing mis-sent property, the similarity between the circumstances addressed in the opinion and other conduct the profession condemns, and the receiving lawyer's obligations to his client.

The committee recognized that some might find an obligation on the receiving lawyer to maximize any advantage that his or her client might gain from a careful examination of the mis-sent documents. The committee noted, however, that the *Rules* are replete with limitations on the "opportunities" that lawyers may seize and found the limitation established in its opinion to be consistent with these other "ethical restraints on uncontrolled advocacy." The committee noted several practical considerations that supported its position. First, no attorney is immune from mis-sending documents; today's beneficiary may be tomorrow's loser. Second, discovery that inadvertently produced documents that were retained and used may prove costly to the recipient. For example, one court recently struck a jury and directed a new selection process after learning that, during jury selection, the plaintiff benefited from the defense's jury selection strategy, which had been mis-sent to the plaintiff's attorneys by facsimile transmission. As a consequence, the plaintiff incurred considerable additional cost. Finally, the committee noted that "doing the right thing" can enhance an attorney's standing with the opposing party and the court, which may inure to the benefit of his or her client.

²Ethics Comm. of the N.C. State Bar Assn., Op. 133, as digested in [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) No. 130, at 1001:6605 (July 17, 1992).

³N.Y. State Bar Assn. Comm. on Professional Ethics, Op. 641, as digested in [Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) Vol. 9, No. 5, at 77 (Feb. 16, 1993).

⁴ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-388, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 1001:155 (1992).

⁵A warning recommended as a cover for facsimile transmissions to limit the risk of inadvertent disclosure of confidential information appears in the TJAGSA Legal Assistance Practice Notes, elsewhere in this issue.

Guard and Reserve Affairs Items

*Judge Advocate Guard and Reserve Affairs Division,
OTJAG*

Update from ARPERCEN

The Judge Advocate General Personnel Management Office has been realigned under the ARPERCEN Office of the Command Judge Advocate. The new office symbol is DARP-ZJA-P. The telephone numbers remain the same: toll-free: 1-800-325-4916; commercial: (314) 538-2120, 2476, or 3762; facsimile: (314) 538-2063; DSN prefix: 892. The current Personnel Management Officers (PMO) are Lieutenant Colonel Dennis M. Carazza and Major James A. Brattain. If your social security number (SSN) ends in 00 to 49, Major Brattain is your PMO. If your SSN ends in 50 or above, Lieutenant Colonel Carazza is your PMO. The Military Personnel Clerk is Ms. Rebecca Reeves.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's Continuing Legal Education (On-Site) Training Program for academic year 1994. If you have any questions on the On-Site schedule, please direct them to the local action officer or Captain David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, Academic Year 1994

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u>	<u>ACTION OFFICER</u>
16-17 Oct 93	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	AC GO RC GO Contract Law Ad & Civ Law GRA Rep COL Cullen MAJ Melvin MAJ Hernicz LTC Hamilton	MAJ William D. Turkula 7290 Topview Road Eden Prairie, MN 55346 (612) 854-7600
23-24 Oct 93	Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	AC GO RC GO Int'l Law Contract Law GRA Rep COL Lassart MAJ Winters MAJ Hughes LTC Menk	LTC Robert C. Gerhard 619 Custis Rd. Glenside, PA 19038 (215) 885-6780
13-14 Nov 93	New York City, NY 77th ARCOM/4th LSO Fordham Law School New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep Cullen/Lassart/Sagsveen MAJ Block MAJ Tomanelli COL Schempf	LTC John Greene 437 73d Street Brooklyn, NY 11209 (212) 264-0650
20-21 Nov 93	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep COL Lassart MAJ Masterson MAJ Drummond LTC Hamilton	MAJ Donald Lynde 94th ARCOM Bldg. 1607 Hanscom AF Base, MA 01731 (617) 377-2845
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep COL Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM TBD	AC GO RC GO Ad & Civ Law Contract Law GRA Rep COL Cullen MAJ Emswiler LTC Dorsey COL Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164

**The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u>	<u>ACTION OFFICER</u>
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l. Law GRA Rep COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002
26-27 Feb 94	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third St., West Salt Lake City, UT 84114	AC GO RC GO Criminal Law Contract Law GRA Rep COL Sagsveen MAJ Wilkins MAJ Killham CPT Parker	MAJ Roger Corman 87th LSO, Bldg. 100 Douglas AFRC Salt Lake City, UT 84113 (801) 833-2119
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep COL Cullen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep COL Sagsveen MAJ Hudson MAJ Jennings LTC Menk	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep COL Lassart MAJ Winn MAJ Diner CPT Parker	CPT Robert J. Moore 10011 Indian Queen Pt. Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 95014-8808 (408) 297-9172
9-10 Apr 94	Fort Wayne, IN Marriott Hotel 305 E. Washington Center Road Fort Wayne, IN 46825 (219) 484-0411	AC GO RC GO Contract Law Int'l Law GRA Rep COL Sagsveen MAJ DeMoss MAJ Warren LTC Menk	MAJ Byron N. Miller 200 Tyne Road Louisville, KY 40207 (502) 587-3400
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep COL Lassart MAJ Hayden LTC Crane COL Schempf	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep COL Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957

**The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u>	<u>ACTION OFFICER</u>
13-15 May 94	New Orleans, LA 122nd ARCOM TBD	AC GO RC GO Int'l Law Criminal Law GRA Rep	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 484-7655
21-22 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	LTC Thomas G. Shumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

1-5 November: 31st Criminal Trial Advocacy Course (5F-F32).

15-19 November: 37th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

29 November-3 December: 17th Operational Law Seminar (5F-F47).

2-3 December: 2d Procurement Fraud Orientation (5F-F37).

6-10 December: USAREUR Operational Law CLE (5F-F47E).

6-10 December: 121st Senior Officers' Legal Orientation Course (5F-F1).

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

31 January-4 February: 32d Criminal Trial Advocacy Course (5F-F32).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

January 1994

3-7, UMLC: 28th Philip E. Heckerling Institute on Estate Planning, Miami Beach, FL.

10-14, ESI: Managing Projects in Organizations, Washington, D.C.

10-14, GWU: Formation of Government Contracts, Washington, D.C.

20-21, GWU: A Practical Introduction to Government Contracting, Washington, D.C.

21-21, ESI: Contracting for Project Managers, Washington, D.C.

24-28, ESI: Federal Contracting Basics, Washington, D.C.

26-28, ESI: Principles and Contractual Aspects of Value Engineering/Analysis, Washington, D.C.

31-February 3, ESI: Managing Cost-Reimbursement Contracts, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1993 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually

New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC

"users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A265755 Government Contract Law Deskbook Vol 1/JA-501-1-93 (499 pgs).
- AD A265756 Government Contract Law Deskbook, Vol 2/JA-501-2-93 (481 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
- AD A259516 Legal Assistance Guide: Office Directory/JA-267(92) (110 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).
- AD A266177 Wills Guide/JA-262(93) (464 pgs).
- *AD A268007 Family Law Guide/JA 263(93) (589 pgs).
- *AD A266351 Office Administration Guide/JA 271(93) (230 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A259022 Tax Information Series/JA 269(93) (117 pgs).

- AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

- AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).
- *AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A255064 Government Information Practices/JA-235(92) (326 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).
- AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

- AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).
- AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).
- AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
- AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).
- AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).
- AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

- AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.*

Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- 1) Active duty Army judge advocates;
- 2) Civilian attorneys employed by the Department of the Army;
- 3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;
- 4) Active duty Army legal administrators, noncommissioned officers, and court reporters;
- 5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;
- 6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and
- 7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 806-5772 thru 5779, or DSN 656-5772 thru 5779 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or explode, the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Recieve, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.	JA268.ZIP	March 1992	Legal Assistance Notarial Guide.
ALAW.ZIP	June 1990	<i>The Army Lawyer/Military Law Review Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.</i>	JA269.ZIP	March 1992	Federal Tax Information Series.
			JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
			JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation & Remedies.	JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook.			
FSO_201.ZIP	October 1992	Update of FSO Automation Program.	JA275.ZIP	March 1992	Model Tax Assistance Program.
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92.	JA276.ZIP	March 1992	Preventive Law Series.
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92.	JA281.ZIP	March 1992	AR 15-6 Investigations.
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92.	JA285.ZIP	March 1992	Senior Officers' Legal Orientation.
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92.	JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1 of 2.
			JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2 of 2.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.	JA290.ZIP	March 1992	SJA Office Managers' Handbook.
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.	JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92.
JA235.ZIP	March 1992	Government Information Practices.	JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA241.ZIP	March 1992	Federal Tort Claims Act.	JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92.
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92.	JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.			
JA262.ZIP	March 1992	Legal Assistance Wills Guide.	JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92.
JA267.ZIP	March 1992	Legal Assistance Office Directory.	JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2.
JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92.
JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT.
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92.
V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan. 92 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
YIR89.ZIP	January 1990	Contract Law Year in Review—1989.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request

from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 934-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

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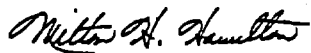
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